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Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ET AL., APPELLANTS,

vs.

DOROTHY BULLITT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

PETITION FOR CERTIORARI FILED JUNE 20, 1963
PROBABLE JURISDICTION NOTED OCTOBER 14, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

No. 5598

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, J. PATRICK DONALY, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALEX GOTTFRIED, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREAVOR J. MCMINN, IRVING MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, AND WILLIAM B. WOOLF, Plaintiffs,

vs.

CHARLES E. ODEGAARD, JOHN J. O'CONNELL, DOROTHY BULLITT, ALBERT MURPHY, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ROBERT J. WILLIS AND HAROLD S. SHEFELMAN, Defendants.

COMPLAINT—Filed June 6, 1962

[fol. 2] Plaintiffs allege:

1. This action arises under section 1 of the Fourteenth Amendment to the Constitution of the United States, as

that Amendment exists independent of the First Amendment and as that Amendment incorporates the First Amendment; and further arises under Article I, Section 10 of the Constitution of the United States. The matter in controversy exceeds the sum of ten thousand dollars, exclusive of interest and costs. This action further arises under section 1343(3) of Title 28, and section 1983 of Title 42 of the United States Code.

2. Each of the plaintiffs is a member of a class so numerous as to make it impracticable to bring them all before the court. The character of the rights sought to be enforced for the various classes is several, but there are common questions of law and fact affecting the several rights and common relief is sought. The plaintiffs here will fairly insure the adequate representation of all members of all classes involved.

3. This action is brought for declaratory relief pursuant to section 2201 of Title 28 of the United States Code and to obtain an interlocutory and permanent injunction of two statutes of the State of Washington pursuant to the provisions of Chapter 155 of Title 28 of the United States Code.

4. Lawrence W. Baggett is employed by the University of Washington as a professor of philosophy, with tenure.

5. Rocky Bauer is a registered undergraduate student at the University of Washington.

6. Z. W. Birnbaum is employed by the University of Washington as a professor of mathematics, with tenure.

7. Joost E. Businger is employed by the University of [fol. 3] Washington as an associate professor of meteorology and climatology, with tenure. He is a citizen of Holland.

8. Isabel S. Caro is employed by the University of Washington as an assistant professor of anthropology.

9. Giovanni Costigan is employed by the University of Washington as a professor of history, with tenure.

10. J. G. Dash is employed by the University of Washington as an associate professor of physics, with tenure.

11. William A. Dawson is employed by the University of Washington as a research instructor in Oceanography.

12. J. Patrick Donaly is an enrolled undergraduate student at the University of Washington.

13. David M. Eaves is employed by the University of Washington as a research assistant in the mathematics department. He is a registered graduate student.

14. John M. Emlen is employed at the University of Washington as a teaching assistant in zoology.

15. T. Saunders English is employed at the University of Washington as an assistant professor of oceanography.

16. Victor Erlich is employed by the University of Washington as a professor of Slavic languages and literature, with tenure.

17. Robert G. Fleagle is employed by the University of Washington as a professor of meteorology and climatology, with tenure.

18. Ronald Geballe is employed by the University of Washington as a professor of physics, with tenure. He is executive officer of the physics department.

19. Patrick T. Goldsworthy is employed at the University of Washington as a research associate professor of medicine.

[fol. 4] 20. Milton P. Gordon is employed by the University of Washington as an associate professor of biochemistry, with tenure.

21. Alex Gottfried is employed by the University of Washington as an associate professor of political science, with tenure.

22. Alvin D. Greenberg is employed by the University of Washington as a teaching assistant in English and is a registered graduate student.

23. Robert E. Greenge is employed by the University of Washington as an assistant professor of anthropology.

24. Gordon Griffiths is employed by the University of Washington as an associate professor of history, with tenure.

25. W. Mary Griffiths is employed by the University of Washington as acting assistant professor of zoology.

26. Isaac Halpern is employed at the University of Washington as a professor of physics, with tenure.

27. Arnold Hanson is employed by the University of Washington as a micrometeorologist.

28. W. Stull Holt is employed by the University of Washington as a professor of history, with tenure.

29. Abraham C. Keller is employed by the University of Washington as an associate professor of romance languages.

30. Arthur L. Kobler is employed by the University of Washington as a research associate professor of electrical engineering.

31. Scott Lytle is employed by the University of Washington as a professor of history, with tenure.

32. Robert W. Macdonald is employed by the University of Washington as a visiting assistant professor of social work.

33. D. F. Magee is employed by the University of Wash-
[fol. 5] ington as an associate professor of pharmacology, with tenure. He is a citizen of the United Kingdom.

34. Henry W. Maier is employed by the University of Washington as an associate professor of social work, with tenure.

35. William H. Matchett is employed by the University of Washington as an associate professor of English with tenure.

36. Karl P. Mauzey is employed by the University of Washington as a teaching assistant in zoology.

37. Treavor J. McMinn is employed by the University of Washington as an assistant professor mathematics.

38. Irving Milowe is employed by the University of Washington as an instructor in the medical school.

39. Roberta Milowe is a registered graduate student in the school of social work at the University of Washington.

40. Wayne C. Muller is a registered graduate student and Falk Foundation Fellow.

41. Rhoads Murphey is employed by the University of Washington as an associate professor of geography, with tenure.

42. David S. Newman is employed by the University of Washington as an instructor of mathematics.

43. Howard Nostrand is employed by the University of Washington as a professor of romance languages and literature, with tenure. He is the executive officer of the Romance Language and Literature Department.

44. Gordon H. Orians is employed by the University of Washington as an assistant professor of zoology.

45. Simon Ottenberg is employed by the University of Washington as an associate professor of anthropology, with tenure.

[fol. 6] 46. Jack R. Parsons is employed by the University of Washington as an associate professor of social work, with tenure.

47. Eugene C. Pizzuto is employed by the University of Washington as an associate professor of art, with tenure.

48. Melvin Rader is employed by the University of Washington as a professor of philosophy, with tenure.

49. Kenneth Eyre Read is employed by the University of Washington as an associate professor of anthropology, with tenure. He is a citizen of Australia and is acting executive officer of the anthropology department.

50. Max Savelle is employed by the University of Washington as a professor of history, with tenure.

51. Annick Smith is employed by the University of Washington as assistant editor of the University of Washington Press.

52. C. A. Valentine is employed by the University of Washington as a visiting assistant professor of anthropology.

53. Leslie Warner is a secretary-typist employed by the University of Washington.

54. James B. Watson is employed by the University of Washington as a professor of anthropology, with tenure.

55. Walter B. Watson is employed by the University of Washington as an assistant professor of sociology.

56. Philip E. Wilcox is employed by the University of Washington as an associate professor of biochemistry, with tenure.

57. Theodore W. Wilcox is employed by the University of Washington as a research associate in the Research Computer Laboratory.

58. William B. Woolf is employed by the University of Washington as an assistant professor in the mathematics department.

[fol. 7] 59. The defendant Charles E. Odegaard is the duly appointed and acting President of the University of Washington. The defendants Dorothy Bullitt, Albert Murphy, Joseph Drumheller, John L. King, Herbert S. Little, Robert J. Willis, and Harold S. Shefelman, are the duly appointed and acting regents of the University of Washington. The defendant Charles E. Odegaard with the advice and consent of the defendant regents, and subject to such regulations as the regents have approved, has the duty of employing and discharging from employment on behalf of the State of Washington all persons employed at the University of Washington.

60. The defendant, John J. O'Connell, is the duly elected and acting Attorney General of the State of Washington. He has the duty of enforcing and interpreting, on behalf

of State of Washington officials, the statutes of the State of Washington. He is the legal adviser of the defendant regents and of the University of Washington.

61. The University of Washington is one of two universities wholly owned and operated by the State of Washington. It employs many thousands of persons and offers academic, scientific and professional education in numerous fields to more than 25,000 persons annually. Through its professors and other teaching personnel it engages in instruction of students and in research, and its academic personnel, therefore, necessarily require as a condition to the satisfactory discharge of their professional duties the widest possible latitude of freedom to inquire, to dispute and to associate with others, which freedom is traditionally granted to universities and to their teachers and students and which is essential to the proper fulfillment of the university's function in American society.

62. Pursuant to Chapter 103, Laws of 1931, and Chapter [fol. 8] 377, Laws of 1955, as interpreted by the Attorney General of the State of Washington, the regents and the president of the University of Washington in 1955 demanded from all employees of the University of Washington, including academic personnel, the execution of an oath, the form of which is set forth in Exhibit "A" attached to this Complaint. The constitutionality of this oath and the statutes upon which it was based was challenged by plaintiffs Nostrand and Savelle in the Superior Court of the State of Washington for Thurston County, Cause No. 28814. The Superior Court held Chapter 377, Laws of 1955, unconstitutional because of a defect in its title. The Supreme Court of the State of Washington, in cause No. 34451, reversed this decision and upheld the constitutionality of the oath and the statute, except as to Section 3 of said statute, which was held unconstitutional and severable. On appeal to the United States Supreme Court, Cause No. 342, October term, 1959, the matter was returned to the State of Washington Supreme Court for a determination of whether the plaintiffs possessed any hearing rights before discharge following a refusal to execute the oath. The State of Wash-

ington Supreme Court thereupon ruled that the plaintiffs involved, having tenure, would be entitled to a hearing upon refusal to execute the oath. The Supreme Court of the United States thereupon dismissed the appeal as not stating a substantial federal question, in view of the ruling of the State of Washington Supreme Court that a hearing was required before discharge. No final determination by the United States Supreme Court of the constitutionality of the oath or statute has thus ever been rendered.

63. Upon advice from the defendant O'Connell, the defendant Odegaard, acting at the direction of the defendant regents has demanded that all members of the university [fol. 9] staff execute an oath in the form set forth in a notice distributed to all employees of the university, dated May 28, 1962, a copy of which is attached as Exhibit "B".

64. Execution of the required oath is by statute and resolution of the defendant regents made a condition precedent to the acceptance of applications for employment, and for the continuation of employment of all the plaintiffs now currently employed at the university, except for those members of the faculty possessing tenure pursuant to their contract of employment with the State of Washington.

65. As to faculty members possessing tenure, the defendant regents by resolution have declared that the only hearing afforded will be limited to the issue of whether any person did in fact fail to execute the required oath, and if it is found as a fact that such was the case then discharge from employment will result regardless of tenure rights.

66. The statutes of the State of Washington requiring plaintiffs to execute such oath, as a condition precedent to their continued employment, or favorable acceptance of an application for employment is an abridgment of their rights, privileges and immunities as secured and guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of said Constitution, and said statutes are unconstitutional and void both on their face and as they have been construed and applied to plaintiffs, and to all others similarly situated.

67. The oath required is vague and indefinite and beyond the power of the State of Washington to require. The summary and automatic dismissal procedures required by the law for failure to execute the oath constitute arbitrary and capricious action forbidden by the Fourteenth and First Amendments to the United States Constitution in that the law subjects plaintiffs to the risks of unfair prosecution and [fol. 10] the potential deterrence of constitutionally protected conduct as well as depriving the plaintiffs and others in their position summarily and without a hearing of their right to work, their good reputation and their good consciences, because among other reasons, in practical effect, refusal to execute the oath produces a built in inference of disloyalty, guilt and unfitness for the employment they now hold. The law further deprives the plaintiffs, and others in their position, of their constitutional rights to fair and reasonable treatment by state officials for the reason that the statutory procedures operate automatically and summarily, on a vague and indefinite standard and in no way do they afford plaintiffs or any other employee: (1) a reasonable notice of charges; (2) the right to a hearing; (3) an opportunity to cross-examine witnesses supporting the charges; (5) an opportunity to offer evidence on one's own behalf; (6) the right to be represented by counsel.

68. All plaintiffs allege that they cannot sign the oath required by the statute in good conscience and understanding for the reason that the statutes requiring the oath employs terminology unconstitutionally vague and indefinite on its face, as authoritatively construed by the Supreme Court of the State of Washington, and as sought to be applied to all plaintiffs. Moreover, if required from the plaintiffs, the statutes requiring the oath violate the First and Fourteenth Amendments to the Constitution of the United States, in that they require the signing of an oath in terms so fluid and vague that men of ordinary and common intelligence must necessarily guess as to its meaning and differ as to its application and further it requires all plaintiffs to speculate as to penal laws which might be applied to them thereby deterring constitutionally protected conduct and to incur substantial risk of unfair prosecution,

[fol. 11] all of which is arbitrary and discriminatory and in derogation of plaintiff's rights as secured and guaranteed by the Fourteenth Amendment to the Constitution of the United States. The statutes, if upheld, will operate in such a manner as to inhibit, deprive and abridge the rights of plaintiffs, and others similarly situated, to constitutionally protected freedom of speech, freedom of association and religious freedom; furthermore said statutes unconstitutionally require a declaration of belief the terms of which are vague and indefinite.

69. The statute requiring plaintiffs and others similarly situated to execute an oath that they will by precept and example promote a reverence for law and order and an undivided allegiance to the government of the United States are unconstitutional under the Fourteenth and First Amendments to the Constitution of the United States in that said statutes require plaintiffs to declare a belief and allegiance abridging plaintiffs rights to constitutionally protected freedom of speech, belief and association; furthermore, such requirement abridges religious freedom and its exercise as declared by the Fourteenth and First Amendments to the United States Constitution.

70. The statutes involved and the oath constitute bills of attainder, ex post facto laws and laws impairing the obligations of contract in violation of Article I, Section 10 of the United States Constitution.

71. As applied to the plaintiffs here and to the members of the various classes on whose behalf this action is commenced, the oath unreasonably abridges the freedom of inquiry, communication and dissent that are essential aspects of freedom of speech in a university community.

72. If required from the plaintiffs, and others similarly [fol. 12] situated, the oath would unreasonably interfere with the contractual rights of tuition paying students to be exposed to and receive the education for which they have contracted, and would unreasonably interfere with the contractual duty of the plaintiffs who are teachers, and others similarly situated, to furnish the education required from them.

73. There is no reasonable justification for requiring the plaintiffs and others similarly situated to execute the oath. The injury which would be inflicted on the plaintiffs and the university community by the requirement of the oath is substantial. It will result in the intimidation of scholars, it will stifle inquiry and dissent, it will make recruitment of personnel more difficult, it will lower the prestige and professional standing of the University of Washington and adversely affect its general reputation, and of all those, including the plaintiffs, employed there. The defendants concede the oath serves no useful purpose and that it does in fact inflict widespread damage, and they are requiring the oath from the plaintiffs and others only because they believe the statute requires them to. But for the mandatory nature of the statute the defendants would not require such an oath, inasmuch as the defendants believe, as do plaintiffs, and it is a fact, that existing recruitment and promotional procedures at the university are adequate to protect the legitimate public interest without the necessity of the oath.

74. Requiring the oath from prospective applicants for employment at the University of Washington deprives the plaintiffs and others similarly situated of freedom of speech and association in violation of the First and Fourteenth Amendments to the United States Constitution in that prospective applicants for academic positions are reluc-
[fol. 13] tant to accept employment on the condition of executing the oath, for the reasons set forth in this Complaint. As a consequence the University has difficulty in attracting professors, and the plaintiffs and others similarly situated are deprived of association with and are isolated from other scholars in their respective fields.

75. The oath unreasonably interferes with the rights of persons who are not citizens to be employed at the University of Washington in that it sets a condition that has no reasonable relationship to the qualifications for fitness to teach and if enforced would cause irreparable damage to the plaintiffs and others who are citizens as well as those who are not, in that it would deprive the university community and all its faculty and students, including the plain-

tiffs, of essential contact and intercourse with citizens of other nations who are outstanding scholars in their fields, and who would be employed at the University of Washington but for such restriction.

76. Unless the defendants are restrained from enforcing the provisions of the statutes challenged, and from insisting on the execution of the required oath, the plaintiffs and others similarly situated will suffer irreparable injury not compensable in monetary damages. Plaintiffs have no speedy or adequate remedy at law. Should the plaintiffs and others similarly situated insist on exercising their constitutional rights and refuse to execute the oath demanded they will be subject, in the case of non-tenured employees, to immediate discharge from employment, and in the case of tenured employees to immediate discharge after a hearing at which the only issue will be whether in fact they have not executed the oath.

77. An actual controversy exists between the plaintiffs, and others similarly situated, and the defendants, and the [fol. 14] plaintiffs seek the judgment of this court on the rights of the parties in the premises.

Wherefore, plaintiffs pray for the following relief:

1. Plaintiffs pray that a special district court of three judges be instituted to hear and determine this action, pursuant to Section 2281 of Title 28 of the United States Code.

2. Plaintiffs pray that pending the hearing and determination by the full court of an application for an interlocutory injunction, that a temporary restraining order be granted, restraining enforcement of the statutes involved, because of the fact, among other reasons, as alleged herein, that irreparable loss and damage will result to plaintiffs unless such temporary restraining order be granted.

3. Plaintiffs pray that the defendants be perpetually enjoined from enforcing the statutes involved and from requiring any oath pursuant to the provision of said statutes, and that pending the final determination of this action, an interlocutory injunction issue to the same effect.

4. Plaintiffs pray that the statutes and oath involved be declared to be void, unconstitutional and of no effect, on the grounds alleged in the complaint.

5. Plaintiffs pray for costs and other equitable relief.

Byron D. Coney, Attorney for Plaintiffs; Address: 1405 Hoge Building, Seattle 4, Washington.

[fol. 15]

STATE OF WASHINGTON

EXHIBIT "A" TO COMPLAINT

OATH FOR ADMINISTRATIVE, RESEARCH, AND FACULTY PERSONNEL OF THE UNIVERSITY OF WASHINGTON

.....

Department, office or other agency (Print or type)

.....

Title or position (Print or type)

STATE OF .....)
)ss. AFFIDAVIT
COUNTY OF .....)

I, the undersigned, do solemnly swear (or affirm):

[1] That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

[2] That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;

That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....
(Signature)

Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 19 ....., at .....,
(City or place)
..... .
(State)

.....

Notary Public in and for the State of .....,
residing at .....

.....

(To be executed in duplicate, one copy to be retained by individual.)

[fol. 16]

EXHIBIT "B" TO COMPLAINT

UNIVERSITY OF WASHINGTON

Office of the President

May 28, 1962

To All Members of the University Staff:

At its meeting on May 25, 1962, the President reported to the Board of Regents that the University had been advised by the Office of the Attorney General of the state of Washington that pursuant to the decision of the Supreme Court of the United States there has now been dissolved the restraining order which had the effect of suspending the requirements as provided by state law that all employees sign the loyalty oath and that the teaching faculty sign, in addition, the oath to support the constitution.

Like every other board, commission, council, department, court, or other agency of the state of Washington, the Board of Regents is required by state law to use procedures designed to ascertain whether a person employed by it is a subversive person and to require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization. The Office of the Attorney General has provided an approved form of statement and oath.

In the case of teaching faculty the oath contains two sections, the first being the oath to support the constitution and the second being the loyalty oath. The text is as follows:

> "I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;
>
> "I further certify that I have read the provision of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; and I swear (or affirm) that I am not a subversive person as therein defined; and
>
> "I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
>
> "I understand that this statement and oath are made subject to the penalties of perjury."

In the case of staff other than teaching faculty, only the second or loyalty oath is required.

The oath to support the constitution has been in effect since 1931 and has not been an object of litigation. The "loyalty" oath was first added in legislation dating from

1955 and has been the object of litigation leading to the deletion of a portion of the law which was declared unconstitutional. Mr. Harlocker, Assistant Attorney General, reports that the statute as upheld now by the courts, in essence requires a person to state that he is not a subversive person or knowingly a member of a subversive organization, that is, a person or organization which commits, advocates, abets, advises, or teaches by any means any act intended to overthrow, destroy, or alter the constitutional form of the government of the United States or of the state of Washington by revolution, force, or violence, the Communist party being declared to be a subversive organization and membership in it being declared to be subversive.

Attention, however, is directed to the full wording of the appropriate provisions of the law which will appear on the reverse of the statement and oath and which are the following:

Subversive Person Ineligible for Public Employment.

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a

member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5))

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010 (2))

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3)).

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083)

Oath Required of Employees of State of Washington.

"... Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for

immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

The law provides that "refusal to answer on any grounds shall be cause for immediate termination" of employment. To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, a check of the personnel records of the University is in process so that those persons who have not previously sworn to the required oaths may be requested to do so. These requests will be submitted as soon as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, compliance will be requested by October 1, 1962, with notification that in the event of failure to comply, employment will be terminated 30 days later as of October 31, [fol. 17] 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign.

In approving this schedule for actions required in order to comply with the law, the Board of Regents adopted the following statement:

"If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination of employment, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with a provision of Washington state law which is binding upon the Board of Regents.

"Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:

"'The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.

"'They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, *maintaining and retaining, however, the responsibilities and obligations of the Board of Regents, as defined in the laws of the state of Washington.*'

"In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs on tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the state of Washington and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath."

[fol. 18] [File endorsement omitted]

SUMMONS—Filed June 6, 1962, and Marshal's Return (omitted in printing).

[fol. 20] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

[Title omitted]

APPLICATION FOR TEMPORARY INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed June 18, 1962

Plaintiffs move the Court for a preliminary and interlocutory injunction, enjoining the defendants and each of

them from enforcing Chapter 103, Laws of 1931, and Chapter 377, Laws of 1955, of the State of Washington, by requiring any of the plaintiffs or any persons similarly situated, to execute the oath set forth in Exhibit "B" attached to the Complaint until the trial of this matter.

Plaintiffs further move the Court for a temporary restraining order, restraining the defendants and each of them from enforcing Chapter 103, Laws of 1931, and Chapter 377, Laws of 1955, of the State of Washington, by requiring any of the plaintiffs or any persons similarly situated, to execute the oath set forth in Exhibit "B" attached to the Complaint, until the earliest possible time the application for a preliminary and interlocutory injunction may be heard.

This application is supported by the attached affidavits.

Byron D. Coney, Attorney for Plaintiffs, 1405 Hoge Building, Seattle, Washington.

[fol. 21]

ATTACHMENT TO APPLICATION FOR TEMPORARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

AFFIDAVIT

LAWRENCE W. BAGGETT, et al., Plaintiffs,

vs.

CHARLES E. ODEGAARD, et al., Defendants.

State of Washington,
County of King, ss.

Gordon Griffiths, being first duly sworn, on his oath deposes and states:

I am one of the plaintiffs in this action, and make this affidavit in support of an application to obtain a temporary restraining order and injunction, restraining and enjoining enforcement of the statutes requiring a loyalty oath from university personnel.

I am acting chairman of the history department. I have received an order from the provost of the University, F. P. Thieme, dated June 4, 1962, a copy of which is attached to this with the notation "Exhibit 1". I responded to this with a letter dated June 13, a copy of which is attached as "Exhibit 2."

I believe the oath and the statutes requiring it to be unconstitutional on the grounds set out in the complaint and for the additional reasons set forth in Exhibit 2. I do believe that the failure to restrain its enforcement pending the trial would result in widespread damage to the university which could not be cured by a subsequent decision declaring the oath void. I say this even though I have been advised that an early trial of this case may

be had in August, before the oaths need technically be [fol. 22] administered. The reason for this is that many people employed at the university will execute the oath in the next few weeks because department heads and deans have been encouraged by the provost to take care of this task before October 1, 1962, to avoid a clerical overload at that time. Thus, even though the oath need not technically be executed until September 30, 1962, the fact remains that many department heads will comply with the provost's request to expedite compliance, and this can only lead to disruption, dissatisfaction and turmoil throughout the university.

Another immediate difficulty which only a temporary restraining order can resolve now concerns the matter of recruitment of new teachers and scholars. Recruitment in the academic world necessarily extends over many months. Many people have been recruited and hired in the last year for the coming school year. Some of these people will be coming from great distances and making extensive financial and personal commitments now in order to come. A good many of these people are not aware that the oath is required and because some may and will object to executing the oath, fairness to them requires that they be notified promptly. If there is no restraining order granted it is likely that some may cancel their commitments to come here even though later proceedings may result in voiding the oath. This type of harm to the university cannot be repaired.

As my letter to the provost states, I am deeply concerned about my status as chairman of the history department. As chairman, I have in effect been ordered to demand from the people in my department an oath which I believe to be illegal and immoral. I have been urged to seek compliance as soon as possible. I know that in refusing to obey this order I am subjecting myself to risks of disciplinary action by the administration, yet I cannot bring myself to perform as directed. Because of this and because the university would suffer no loss if the oath [fol. 23] requirement would be temporarily restrained, I believe a temporary restraining order to be essential in

order that the existing state of affairs be preserved until the issues can be finally resolved in court.

Gordon Griffiths

Subscribed and sworn to before me this 18th day of June, 1962.

Byron D. Coney, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 24] EXHIBIT 1 TO AFFIDAVIT

(Emblem)

UNIVERSITY OF WASHINGTON
OFFICE OF THE PRESIDENT

June 4, 1962

Memorandum to Deans, Directors, and Chairmen

Subject: Statutory Statement and Oath for Faculty and Staff

You have already received a statement of May 28 indicating that the University of Washington is now under legal obligation once again to ask that oaths be signed. I am now writing to expand the initial statement with respect to the process to be followed in obtaining the signatures. The May 28 statement contained a description of the background leading up to the present statutory requirement that we again ask teaching faculty and all other personnel on the staff to sign a statement and oath and gave the form to be used. Copies of the two statements and oaths, Form A for the teaching faculty and Form B for all other members of the staff, are attached.

To enable the University to carry out these responsibilities, *you are asked to request* all persons having teaching responsibility, who have not previously signed the appropriate oath, to sign Oath Form A. For the purposes of this statement and oath, teaching faculty is interpreted as including *all teaching fellows, pre-doctoral associates,* lec-

turers, instructors, and the professorial ranks. If *research appointees* holding professorial titles actually engage in any kind of teaching, as determined by the academic officer who is responsible for the assignment of their duties, they should be asked to sign Oath Form A. If they do not have teaching responsibilities, then they must be asked to sign Form B. Whether the person is paid from general University *funds* or contract and grant funds administered by the University is *irrelevant.*

Oath Form B should be signed by *all* other members of the University *staff*, whether paid on *full-time, part-time or hourly basis* and whether they are a student or not. Again, any person who has previously signed the appropriate statement and oath need not repeat it.

It is evident that the task of obtaining all of these notarized signatures will be protracted and time consuming. Therefore, I am sending to you in this mail a supply of Oath Form A and B with the suggestion that those who wish to complete the form prior to the October 1, 1962 deadline be encouraged to do so since it will reduce the costs of administration in meeting statutory requirements if as many persons as possible will complete the form in the course of the summer and thus reduce the "crash" clerical operation which would otherwise have to be faced near October 1, 1962.

As October 1 approaches, it will be necessary to check the forms received against the total list of appointments or payroll records. For this reason each director or *chairman is asked* to take whatever means he wishes to devise and *keep a record of those under his administrative supervision* who have signed the new forms. My office will soon prepare a list of persons in your unit who have already signed and thus need not submit a new Oath Form A or B. Thus by October 1 each of you should know whether the entire staff under your supervision will have signed the oath and thus be eligible for continuation on the payroll after that date.

[fol. 25] In order to make the task as easy as possible, the following employees on the campus will serve to notarize signatures during regular office hours:

Name	*Department*
Miss Betty Gahringer	Registrar's Office
Professor W. M. Read	University Press
Mrs. Sally Hall	Hospital
Mr. James Reilly	Applied Physics Laboratory
Miss Grace Uyeda	Health Sciences Business Office
Mr. Harry W. Seymour	Registrar's Office
Mr. G. L. Goodson	Hospital
Miss Louise B. Carroll	Engineering
Mrs. Aline Foster	Cashier's Office
Mrs. Betty Thumlert	Payroll

If other names are added, you will be informed of them.

Your attention is also called to the need for informing appointees who are to be on duty October 1, but who have not yet reported on the campus that they must sign the oath. These persons, as well as prospective faculty appointees and employees should be sent a copy of the oaths, *and of the explanatory statement of May 28, 1962.* Signed forms from these persons must be in our hands by October 1, 1962, or at the time of their employment if subsequent to that date.

If you have any question regarding procedures to be followed, please address your inquiry to your dean or division head. If additional copies of the forms and of the statement of May 28 are needed, they can be obtained by calling the Payroll Office, Extension 2668.

/s/ F. P. Thieme

F. P. Thieme
Provost

FPT:ml

Enclosures

DDC-78

[fol. 26] EXHIBIT 2 TO AFFIDAVIT

UNIVERSITY OF WASHINGTON

DEPARTMENT OF HISTORY
SEATTLE 5

June 13, 1962

Dr. Frederick P. Thieme
Provost of University
President's Office
301 Administration Building
Campus

Dear Dr. Thieme:

In your memorandum of June 4, 1962, you asked me to request the staff of the Department of History to sign an enclosed Statement and Oath (the so-called "loyalty" oath), and to keep a record of those who have done so.

Because the Oath, in the second paragraph of Form A, appears to me to be in violation of the Constitution of the United States, I think I am confronted by conflicting obligations. On the one hand I am being asked to engage in what may be illegal acts and so to expose myself to the possibility of criminal liability. On the other hand, if I decline to carry out your request, I may become subject to disciplinary proceedings for disobedience of directives from my superior. This difficulty presents itself on both Form A and Form B.

I find this additional difficulty in Form A, that its second paragraph, if it is unconstitutional, in contradiction to the first, which includes a solemn oath to support the constitution of the United States.

As Acting Chairman of the Department of History, I am bound to defend its interests as I see them, as well as the interests of its members as individuals. Many of them feel a conscientious objection to taking the "loyalty" oath, for reasons including those I mention here. Their feelings confront me with another conflict of obligations. I have the

strongest reluctance to execute your request when this means I must impose upon my colleagues an instrument they regard as offensive. I find repugnant the idea of keeping records of the "loyalty" of my colleagues. Furthermore, it seems to me to be highly improper for the chairman, who has an important influence in the determination of salaries, to be placed in a position to force consciences.

I cannot answer for the consequences of an attempt to impose the oath upon the Department. Even under the conditions of ten years ago, the University of California lost some of its most distinguished scholars through such an attempt. Now, when conditions in the academic market make it much more difficult to attract and hold good men, the attempt might be disastrous. I have invited the attention of the Dean of the College to the difficulties which the Department has already encountered when attempting to recruit men of first quality. At Princeton, at Stanford, at my former college of Lawrence in Appleton, Wisconsin, we have met the same hesitant questioning as to whether the candidate would be leaving an atmosphere of freedom of inquiry to enter one in which it was stifled. As I wrote to Dean Katz on May 16, "The (loyalty) oath . . . is certain to reduce the attractiveness of employment at this University. Anyone who knows anything about the attitudes of scholars in History (as well as in some other subjects) will appreciate their concern on this subject."

[fol. 27] For all the above reasons, and in the light of my interpretation of the Oath, until I receive a clarification of the conflict of interest which bothers me and a directive to do so, I feel compelled to decline to request the oath of the members of this Department, pending clarification of the issues in the courts.

I consider that I am acting out of loyalty to the political tradition out of which our constitution developed. As John Locke pointed out,

> The community perpetually retain a supreme power of saving themselves from the attempts and designs of any body, even of their Legislators, whenever they

shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject. (Second Treatise, section 149).

Respectfully yours,

Gordon Griffiths
Acting Chairman

GG/js

[fol. 28]

ATTACHMENT TO APPLICATION FOR TEMPORARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON,

NORTHERN DIVISION

No. 5598

AFFIDAVIT

LAWRENCE W. BAGGETT, et al., Plaintiffs,

vs.

CHARLES E. ODEGAARD, et al., Defendants.

State of Washington,
County of King, ss.

Kenneth E. Read, being first duly sworn, on his oath deposes and states:

I am one of the plaintiffs in this action and make this affidavit in support of the application for a temporary restraining order and injunction. I am an associate professor of anthropology and am acting Chairman of the Anthropology Department. I am a citizen of Australia.

I have read the affidavits of Ronald Geballe and Gordon Griffiths and agree with the statements made therein.

I want to emphasize that the University will suffer no damage of any kind by the granting of a temporary restraining order now. On the other hand I agree with Professors Geballe and Griffiths that the next several months are critically important insofar as the administration of the oath is concerned. If it is not temporarily enjoined then it is certain that many chairmen of departments will comply with the directive of the provost and expedite the administering of the oath. Even though in a technical sense the oath need not be executed until the end of September, 1962, yet many persons will do so through ignorance of their rights, or reluctance to assert them. In addition, many people employed at the university are [fol. 29] leaving for periods extending beyond the October deadline. In my own department several men will be leaving shortly for New Guinea for many months and the regulations are not clear that they may execute the oath on their return if they return after October 1, as a consequence there is serious doubt as to whether they should execute the oath now. This is only one example of many different situations which may arise. A similar problem arises in respect to newly hired people, or others about to be hired either on a temporary or visiting basis or as permanent additions to the faculty. Many of these people have strong objections on legal grounds to execution of such an oath. If no restraining order is granted these people will be in doubt as to their legal rights and those who object to executing it and who must make arrangements now are in an impossible situation.

Even though the trial of this action may occur before October 1, I have been advised by counsel that no matter which way the case is decided it is likely that an appeal will result which could under no circumstances be heard before October 1, 1962. As a consequence lasting adverse results will accrue to the university generally if there is no clear directive from the court. That until the matter is resolved by the Courts no one need execute the oath, regardless of how far in the future the university admin-

istration postpones the effective date. Such a ruling could only redound to the benefit of the university as a whole.

K. E. Read

Subscribed and sworn to before me this 18th day of June, 1962.

Byron D. Coney, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 30]

ATTACHMENT TO APPLICATION FOR TEMPORARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

AFFIDAVIT

LAWRENCE W. BAGGETT, et al., Plaintiffs,

vs.

CHARLES E. ODEGAARD, et al., Defendants.

State of Washington,
County of King, ss.

Ronald Geballe, being first duly sworn on oath, deposes and states:

I am one of the plaintiffs in this action and make this affidavit in support of an application to obtain a temporary restraining order and injunction restraining enforcement of the statutes requiring a loyalty oath from university personnel.

I am chairman of the physics department. I have received a directive from the provost of the university, F. P. Thieme, dated June 4, 1962, a copy of which is attached hereto as Exhibit 1. I believe the oath and the statutes

requiring it to be unconstitutional on the grounds alleged in the complaint in this action. Unless a temporary restraining order is granted pending a trial of the issues of this case I can refuse to administer the oath to the faculty members and others in my department only at my peril. If the statutes and the oath should eventually be held constitutional then any refusal on my part now would subject me to the possibility of disciplinary action or discharge. On the other hand, if I demand that personnel in my department execute the oath I may be demanding [fol. 31] an illegal act that likewise could subject me to legal action.

There is no question but that if a temporary restraining order is not granted now, many people employed at the university will be presented with the oath and will execute it, thus being deprived of what I believe to be their constitutional rights not to do so. This will result because of the encouragement from Provost Thieme to deans, directors and chairmen to get the job done before October 1, 1962, to avoid a clerical overload.

It is my belief that neither the university nor the defendants will suffer any loss or damage if a temporary restraining order is granted, but if a temporary restraining order is not granted all of us at the university will suffer an injury which would not be repaired even by a successful outcome of the trial of the action.

Ronald Geballe

Subscribed and sworn to before me this 16th day of June, 1962.

Byron D. Coney, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 32] Clerk's Note

Memorandum to Deans, Directors, and Chairmen, dated June 4, 1962 is omitted from the record here as it appears printed on page 23, side folio 24 supra.

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 5598

[Title omitted]

AFFIDAVIT OF FREDERICK P. THIEME—Filed June 20, 1962

[fol. 35]
State of Washington,
County of King, ss.:

Frederick P. Thieme, being first duly sworn, on oath deposes and says: I am a citizen of the United States of America and the state of Washington, over the age of twenty-one years, and competent to be a witness herein.

I am now, and for all times pertinent hereto, have been, Provost of the University of Washington. As Provost I am the principal academic officer of the university and have under my direct administration the processing of all academic appointments. The faculty personnel office is under my jurisdiction and I am responsible for the handling of all forms relating to the status of all academic personnel. In addition, my general responsibilities require me to establish policy and procedures affecting nonacademic employees.

The removal of the previous legal restraining order has presented the University of Washington with a difficult problem as it tries to set up clear-cut procedures to meet the statutory requirement that all teachers sign one form of the oath and all other employees sign a more limited form of oath. To indicate the size of the task involved in these procedures, it needs to be realized that some 13,000 persons are employed full or part time by the University. Included in this total are many students employed for a few hours at a time; nearly 3,500 versons paid from non-state-appropriated grant and contract funds; over 450 clinical staff appointees, eighty per cent who serve without stipend but who still contribute in some degree to teaching and research activities; a number of faculty and staff on the payroll who are currently serving outside the state or even the national boundaries; and many other persons who because of the nature of their duties are not easily classifiable

as to the form of oath they must sign or, indeed, whether they are to be included at all under the provision of the statute as it affects state employees.

This latter question, for instance, arises in the case of the Applied Physics Laboratory, which is supported in its en- [fol. 36] tire operation by the U. S. Navy Bureau of Weapons and employs nearly one hundred security-cleared persons. The same question of proper classification applies to the over three hundred research assistants and the ninety-odd research professorial appointees and other supporting personnel who are paid from grant and contract funds. These funds represent a considerable part of the payroll; during the past fiscal year the University expended over $15,000,000 from such sources, and in the following years that sum will almost surely increase. The most significantly complicating element in this classification of personnel, however, is not its numbers but the fact that many persons in it have, from time to time, responsibilities for instruction. In many cases these responsibilities cannot be immediately and clearly defined as teaching responsibilities; in all cases, the University will need to make individual inquiry about which form of oath it is proper to ask them to sign. Whatever the final disposition of matters to satisfy the legal requirements, it is clear that the procedures to be followed in the administration of the oaths are not only complex and time consuming but involved with knotty questions of definition and classification.

A special complicating element has been added with the institution on June 6, 1962, of judicial proceedings which question the validity of the statutes requiring the oath. Since June 7 the University has been deluged with queries as to whether the oath need now be signed. It is being asked, for example, whether prospective employees who are due to report next fall are obliged to sign and if so what will be their obligation at that time. And there are other basic questions. Some of these center on the fact that the regular teaching faculty is made up of over 1,400 individuals of whom only approximately eight hundred hold tenure. Those with tenure have the right of hearing, yet if they do not sign by October 1, 1962, their status during the pen-

dency of their hearing is uncertain. The question coming from them is whether they be allowed to teach or not while their status is being determined. A further question is this: in light of the test of the validity of the oath statutes, will [fol. 37] the requirement of signing apply only to non-petitioners? All of these questions come at a time when the University is facing a shortage of qualified staff.

The University takes a responsible attitude toward these and similar questions from its personnel and will proceed as expeditiously as possible to deal with them. However, while the problems of the administration of the oath prior to June 6 were demanding, the institution of further proceedings to test the validity of the oath now introduces additional questions, new personnel problems, and unavoidable turmoil which will endure so long as the statute is under judicial review.

Frederick P. Thieme

Subscribed and sworn to before me this 13th day of June, 1962.

Aline R. Foster, Notary Public in and for the state of Washington, residing at Seattle

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[fol. 38] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

AFFIDAVIT—Filed June 20, 1962

State of Washington,
County of King, ss.

I, Mrs. Jean Ashford, Acting Librarian of the Health Sciences Library of the University of Washington, being duly sworn, depose and say that on or about June 4, 1962, I received twenty (20) copies of the oath forms which were referred to in President Odegaard's statement of May 28; that I began distribution of these forms on Monday, June 11, 1962; that the University employees under my superyi-

sion have been requested to return the completed forms to me "as soon as possible"; that approximately seven employees have already completed, signed, and had notorized, and returned said oath to me.

Jean Ashford, Acting Librarian, Health Sciences Library.

Subscribed and sworn to before me this 19th day of June, A.D. 1962.

Grace Uyeda, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 5598

[Title omitted]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE—June 25, 1962

This Matter coming on for hearing before the undersigned Judge of the above-entitled Court on the application of the plaintiffs for a temporary restraining order, and the Court having examined the affidavits in support of said application, finds on the basis thereof that unless a temporary restraining order is granted as requested by plaintiffs that irreparable damage will result to the plaintiffs and the members of the various classes they represent in that loyalty oaths in the form alleged by the plaintiffs have now been distributed to the Deans of the various colleges, department heads, and executive officers for presentation to the plaintiffs and others similarly situated, and unless restrained temporarily now it is likely that many persons

employed at the University will execute the oath before its constitutionality can be tested in this action, and once having executed it such persons will be deprived of their constitutional rights to refuse to execute such oath which the plaintiffs allege are possessed not only by plaintiffs but by all persons similarly situated. Moreover, the plaintiffs who are executive officers of departments have been directed by defendants to administer the loyalty oath and encouraged to do so expeditiously, and unless a temporary restrain- [fol. 40] ing order is granted now, these plaintiffs will be placed in the position of having to demand from others an oath they believe to be illegal and unconstitutional, or disobey an order from their administrative superiors with consequent results. In addition, some employees of the university are leaving prior to July 1, 1962, for remote parts of the world, such as New Guinea, and will not return by October 1, 1962. The issues raised are substantial. Whatever harm or inconvenience to the defendants that may result from a temporary restraining order is more than outweighed by the harm, inconvenience and threatened loss of constitutional rights incurred by the plaintiffs and the classes they represent if a restraining order is not granted. On the basis of these findings, it is

Ordered, Adjudged And Decreed that the defendants and each of them be and they are hereby temporarily restrained from enforcing Chapter 103, Laws of 1931 and Chapter 377, Laws of 1955, of the State of Washington, by requiring the plaintiffs or others similarly situated to execute either Oath Form A or Oath Form B, copies of which are attached to this order, and it is further

Ordered, Adjudged And Decreed that the defendants and each of them are hereby ordered to appear on Friday, July 13, 1962 at 2 P.M., or on such other day as the matter may be continued to in accordance with law, before a special United States District Court of three Judges convened at the United States Courthouse at Seattle, Washington, in accordance with the requirements of Chapter 155 of Title 28 of the United States Code, and then and there show cause, if any they may have, why this temporary restraining order should not be continued in effect as a preliminary

and interlocutory injunction pending the trial of this action, [fol. 41] in accordance with the motion of the plaintiffs; and it is further

Ordered, Adjudged And Decreed that a condition of this restraining order shall be the giving of security by the plaintiffs consisting of a bond in the amount of $1000.00 for the payment of such costs and damages as may be incurred or suffered by any party who was found to have been wrongfully enjoined or restrained.

Done In Open Court this 25th day of June, 1962.

William J. Lindberg, District Judge.

Presented by: Byron D. Coney, Attorney for Plaintiffs, 1405 Hoge Building, Seattle 4, Washington.

[fol. 42]

ATTACHMENT TO TEMPORARY RESTRAINING ORDER

Oath Form A

STATE OF WASHINGTON

Statement and Oath for Teaching Faculty of the University of Washington

I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

I further certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....
(Signature)

.....
(Title and Department)

Subscribed and sworn (or affirmed) to before me this .....day of ....., 19.....

.....
Notary Public in and for the state of Washington, residing at .....

.....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed," respectively.

[fol. 43] *Subversive Person Ineligible for Public Employment.*

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state

of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5))

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010 (2))

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3))

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083)

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every

employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

[fol. 44]

ATTACHMENT TO TEMPORARY RESTRAINING ORDER

Oath Form B

STATE OF WASHINGTON

Statement and Oath for Staff of the University of Washington Other Than Teaching Faculty

I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....
(Signature)

.....
(Title and Department or Office)

Subscribed and sworn (or affirmed) to before me this .....day of ....., 19.....

.....
Notary Public in and for the state of Washington, residing at .....

.....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed," respectively.

[fol. 45] *Subversive Person Ineligible for Public Employment.*

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

" 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5))

" 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United

States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010 (2))

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3))

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083)

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

[fol. 46]. [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 5598.

[Title omitted]

NOTICE OF AMENDMENT OF COMPLAINT—Filed July 9, 1962

To: The defendants

The Attorney General and Herbert Fuller, his assistant. Attorneys for defendants.

Please take notice that the plaintiffs move to amend their complaint by substituting the following paragraph for paragraph 76 of the complaint.

"76. Unless the defendants are restrained from enforcing the provisions of the statutes challenged, and from insisting on the execution of the required oath, the plaintiffs and others similarly situated will suffer irreparable injury not compensable in monetary damages. Plaintiffs have no speedy or adequate remedy at law. The plaintiffs and others similarly situated insist on exercising their constitutional rights and refuse to execute the oath demanded. They will be subject, in the case of non-tenured employees, to immediate discharge from employment, and in the case of tenured employees to immediate discharge after a hearing at which the only issue will be whether in fact they have not executed the oath.

Byron D. Coney, Of Counsel for Plaintiffs.

Proof of service (omitted in printing).

[fol. 47] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 5598

[Title omitted]

ORDER DISMISSING CERTAIN PLAINTIFFS—Filed July 17, 1962

The defendants having moved to dismiss the action as to all plaintiffs, such motion containing the following ground, among others:

1. To dismiss the action as to plaintiffs, Rocky Bauer, Jay Patrick Donaley, Robert Milowe, and Wayne C. Muller, on the ground that they lack standing to challenge the validity of the oath requirement statute (Chapter 254, Laws of 1951, as amended, Chapter 377, Laws of 1955, RCW 9.81), inasmuch as they are not "public officials" or "employees" of the State of Washington within the meaning of that statute, but students attending the University of Washington; nor are they "teachers" under Chap. 103, Laws of 1931.

Briefs having been submitted and argument having been heard on July 13, 1962, before Gilbert H. Jertberg, United States Circuit Judge, William J. Lindberg, United States District Judge, and William T. Beeks, United States District Judge, it is hereby

Ordered that the motion to dismiss be and the same is hereby denied except as to the ground set forth above. It is therefore

Ordered that plaintiffs Rocky Bauer, Jay Patrick Donaley, Roberta Milowe, and Wayne C. Muller, be and they [fol. 48] are hereby dismissed with prejudice.

Dated This 17th day of July, 1962.

William J. Lindberg, United States District Judge.

Presented by: Herbert H. Fuller, Deputy Attorney General, Of Attorneys for Defendants.

[fol. 49] [File endorsement omitted]

[fol. 50]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil Action
No. 5598

[Title omitted]

DEPOSITION UPON ORAL EXAMINATION OF WILLIAM Z. BIRNBAUM—Filed July 18, 1962

Seattle, Washington
July 5, 1962

APPEARANCES:

For the Plaintiffs: Arval Morris, Attorney at Law, Byron D. Coney, Attorney at Law.

For the Defendants: Herbert H. Fuller, Deputy Attorney General, Ernest M. Furnia, Assistant Attorney General.

[fol. 51] Be It Remembered, that pursuant to written notice and on Thursday, July 5, 1962, at the hour of 2:00 o'clock thereof, at the Hoge Building, Seattle, King County, Washington, before me, Louis R. Guevara, a Notary Public in and for the State of Washington, personally appeared William Z. Birnbaum, a Plaintiff herein, called as a witness at the instance of the Plaintiffs, who, having been first duly sworn, was thereupon examined and testified in said cause.

WILLIAM Z. BIRNBAUM, a Plaintiff herein, called as a witness, having been first duly sworn, was examined and testified as follows:

Mr. Morris: This deposition is taken pursuant to the Federal Rules of Civil Procedure. It is agreed that all objections are waived, except that counsel for Defendants expressly reserve their full rights of objection to the form of the questions and substance of the answers elicited

thereto. It is understood all objections can be made and ruled upon at the time of trial.

Q. Would you state your name and address for the Court, please?

A. Birnbaum. My first name is Z. William. The address is 14620 Southeast 55th Bellevue, Washington.

Q. And would you tell the Court what your occupation is?

A. I am professor of mathematics at the University of Washington, Director of the laboratory of statistical research.

[fol. 52] Q. Professor Birnbaum, are you a Plaintiff in this case?

A. Yes, sir.

Q. Professor, how long have you been employed at the University of Washington?

A. Since September, 1939.

Q. Are you a tenured employee?

A. Yes.

Q. Professor, are you in possession of any information which would indicate that any aspect of your employment has been unfavorable to your employer?

A. No.

Q. Would you state for the Court your teaching and research experience before becoming a faculty member at the University of Washington?

A. My original education took place in Poland. I taught mathematics in what was known as Gymnasium. There I conducted seminars in mathematics at the University of the City of Lwow, Poland. I spent two years on post-doctoral research in mathematics at the University of Goettingen, Germany. I was for a period of six years an actuary, and part of that time Chief Actuary, for a life insurance company. During all that time I have conducted research and published research papers. The time from 1937 to 1939 I spent in the employ of the New York University where I had a research appointment. I arrived at [fol. 53] the University of Washington in 1939.

Q. Could you describe briefly the extent of your formal education?

A. Grade school in Gymnasium, in what used to be an autonomic monarchy, and part of it later became part of Poland. Master of Law degree at the University of Lwow, Poland; teaching certificate in mathematics at the same university; Ph.D. degree in mathematics at the same university; two years of post-doctoral work at the University of Goettingen; diploma of an actuary at the University of Goettingen. That is about my formal training.

Q. Did you say that you came to the University of Washington in 1939?

A. Yes.

Q. What has been your major field of research and teaching in your almost twenty-three years at the University of Washington?

A. Besides the standard courses which I have taught as part of my teaching obligations, my specialty has been the theory of probability and mathematical statistics.

Q. How long have you been a professor at the University of Washington?

A. My first appointment was as acting assistant professor. The attribute "acting" was removed after one year. And I do not recall the exact dates of my promotions.

[fol. 54] Q. Do you remember the date of your last promotion, to full professor; do you have some idea?

A. At least ten years ago, but I am not sure of the date.

Q. Professor, have you done any writing in your specialized area which has been published?

A. I have published one book, more than forty original research articles, and a large number of publications, such as book reviews, critiques, comments on other works.

Q. Have you delivered any papers or addresses on the subjects of your research and teaching?

A. On the average two or three a year; some of them invited addresses at congresses, at meetings; some of them contributed papers of a short duration, invited. This is usually being one hour.

Q. Have you received any fellowships?

A. I held a Guggenheim Grant for a year. I have, many years ago in Poland, received government fellowships for my study and research.

Q. During your time at the University of Washington have you received any honors and recognition on your writing and teaching in the area of your specialty?

A. I have been President of the State of Washington Chapter of the American Statistical Association. Pardon me—misnomer. Not the State of Washington, the Pacific Northwest Section of the American Statistical Association. [fol. 55] President of the Pacific Northwest Division of the Society for Industrial and Applied Mathematics. I have been a member of the Council of the Institute of Mathematical Statistics; Fellow of the Institute of Mathematical Statistics; Fellow of the American Statistical Association. That is all.

Q. When you deliver the lectures that you mentioned earlier, do you deliver these lectures at the invitation of various organizations?

A. Yes. The so-called invited addresses were always by personal invitation.

Q. Are you a member of the organizations from which you received some of the invitations?

A. Yes, sir.

Q. Is it necessary for you to belong to certain professional organizations in order to maintain your professorial status and reputation?

A. It is essential for maintaining contact with one's colleagues in the profession, for keeping well informed and up-to-date on the state of the art, to be a member of various national and international organizations.

Q. Could you tell us the organizations to which you belong; just those that are directly connected with your professorial activities?

A. The American Mathematical Society, The Mathemati- [fol. 56] cal Association of America, the Institute of Mathematical Statistics, the American Statistical Association, the Society for Industrial and Applied Mathematics. I don't know if you consider, let's say, the American Association of University Professors in the same category. It is a professional organization.

Q. Do you attend the meetings of these organizations from time to time?

A. As regularly as my time permits.

Q. What is the general purpose of these organizational meetings?

Mr. Fuller: Object to the form of the question as being leading.

By Mr. Morris:

Q. Could you describe what takes place at the organization meetings?

A. At those meetings, depending on whether they are on the regional, national, or international level, people specializing in a field of study and research get together and present contributed papers, which are brief presentations of recent research results; longer expository papers; and invited addresses in which whole areas of a field are presented in more detail. In addition to that people of common interest meet informally outside of the actual lecture rooms and exchange recent discoveries, recently obtained information in an informal conversation and discussions. They [fol. 57] exchange anything from recently acquired knowledge of scientific progress to personal news: who will be located where during the next year; where he can be reached; can I correspond with him; what is he interested in. Informal explorations take place about available positions; academic teaching/research positions; about the possibility of being invited for visiting appointments for short periods of time and longer periods of time from university to university, from country to country. So that the whole range is covered between the exchange of purely scientific information to practical information on the people involved. And there is a certain amount of social get-together. Also, usually at meetings of that kind, at least once a year, elections take place: officers are voted in, committees are assigned, various specialized committees meet and transact business.

Q. Are the organizations to which you belong limited to Americans?

A. No.

Q. Could you describe for the Court the membership of some of the organizations in which you participate?

A. The International Congress of Mathematicians, which I expect to attend in the near future, is a global organization at which mathematicians from all countries will be represented.

[fol. 58] Q. Could tell us how old that Congress—what the organization—

A. (Interposing) It is an international organization which is called the International Congress of Mathematicians. They meet once every four years. They maintain a permanent office in the interim period. And the physical location of the Congress is determined by invitation and negotiation from one four-year session to another. That would be one of the organizations.

And just to complete the answer to your question, the Institute of Mathematical Statistics, to which I am quite closely connected as a member of the Council and an active member of the various committees for many years—and which also will hold a meeting this summer—is a professional organization which initially was American, but expanded by creating a European Division. And the meeting I expect to attend will be held in Dublin, Ireland. And it will be sponsored by the European Division of the Institute of Mathematical Studies. So by now the Institute of Mathematical Statistics encompasses at least two continents, the American Continent and the European.

Q. Could you describe for us some of the people who will be in attendance at that meeting? Tell us from what country they will come.

A. May I start with the International Congress of Math-
[fol. 59] ematicians? There will be mathematicians from all countries in which mathematical research is actively pursued. And that includes in particular the American Continent, Western Europe, and a substantial number of countries behind the Iron Curtain.

Q. Could you tell us what countries you are referring to as countries behind the Iron Curtain?

A. Spectacular mathematical research goes on in the Soviet Union, in Poland, Hungary, Czechoslovakia; in about this order of magnitude. The most important work being done in Russia, then in Poland, then in Hungary and

Czechoslovakia. I expect representatives from at least these four countries to be present.

Q. Would you expect you would be in association with them at this Congress?

A. Yes. I have known some of the most outstanding Russian mathematicians since I have worked together with them at Goettingen in 1931 and '32; some of my former acquaintances from Poland, whom I have known before leaving for the United States, and whom I have met repeatedly at previous International Congresses.

Q. What is the nature of the association that you will expect to have, and that you have had in the past at these meetings?

A. It will be at the official events of the Congress; a [fol. 60] matter of communicating news and achievements.

Q. Now, will your exchange of information with scholars from the Soviet Union and other Iron Curtain countries deal with information which could be of military significance?

A. None of the information I have and will present is in any sense classified information. Whether it may have military significance is a question which nobody can answer, because any human endeavor can possibly be used for military purposes. And a straight yes or no answer is impossible.

Q. Could you tell us why you have attended the meetings of the International Congress, and why you are going to this next meeting?

A. It is part of my professional duties to keep abreast on the most recent developments in my field, to keep in touch with other people who do the same kind of work. International Congresses are indispensable means for keeping in immediate contact, without lag of time if possible, with achievements in other countries.

Q. Are you going to the Congress as a participant or do you hold an office with the International Congress?

Mr. Fuller: Pardon me. I object to the form of the question.

Mr. Morris: I will restate it.

Q. In what capacity will you be going to the meeting of the International Congress to be held at Dublin?

[fol. 61] A. In Stockholm. The International Congress of the Institute of Mathematicians is in Stockholm. There I will be as one of the two official delegates of the University of Washington. Eleven members of our faculty will be there. Two of them are designated as official delegates. I also have been invited to serve as Chairman of certain sections of the Congress.

Q. Do you hold any office?

A. I may add one more thing. My attendance there is being sponsored by the Office of Naval Research.

Q. Could you describe that in greater detail, please?

A. I have been the Chief Investigator—or an alternate title, Project Director of Research Contracts sponsored by the Office of Naval Research now for a considerable number of years—since 1948. In that function I have been delegated by the Office of Naval Research to many different meetings; and this is one of such missions.

Q. I would like to ask you a question about your other sponsor, the University of Washington. Are you going with the official approval of the University of Washington?

A. Yes.

Q. Do you expect to be in contact with people from the Soviet Union?

A. Yes.

Q. Now, I would like to ask a question about the other [fol. 62] organization to which you belong, the Institute of Mathematical Statistics. Could you tell me what the nature of its meetings happen to be?

A. The Institute of Mathematical Statistics is the leading professional organization of mathematical statisticians. The journal they publish, called the "Annals of Mathematical Statistics" has been the leading periodical in this special field of mathematics. The meetings of the Institute of Mathematical Statistics have all the functions of meetings of a scientific society. And, as I have mentioned before, I have been particularly active within the framework of the Institute of Mathematical Statistics. As a matter of fact, my name has been put on the ballot as the only candidate

for President Elect of the Institute of Mathematical Statistics. And the election will take place in September, this year.

Q. Does this procedure mean that it is inevitable that you will be elected President?

A. Barring very unforeseen occurrences, yes.

Q. Being the only candidate you would probably, then, be President of the Institute for the year 1963-'64?

A. Correct.

Q. Would you describe for the Court the nature of the duties you would be called upon to perform as President of the Institute of Mathematical Statistics?

[fol. 63] A. The functions of the President are described in the Constitution and Bylaws of the Institute, which I don't have before me at this point, but I can describe them by experience and knowledge. The President of the Institute represents the Institute at most official occasions. He appoints committees of the Institute. He transacts correspondence in the name of the Institute with other scientific organizations, government agencies, individuals in the United States and abroad. He is responsible for initiating and pursuing the scientific policies of the Institute—scientific and professional policies of the Institute. That is in a very few sentences the function of the President.

Q. Would your election to this office be considered an advance in your professorial status within your profession?

A. It is the highest honor that a member of the profession can achieve within the profession.

Q. Will you have any contact with members of the Soviet when you discharge these duties?

A. Judging by past experience, the office of the President of the Institute of Mathematical Statistics receives and handles a steady flow of communication and correspondence from all over the world. In view of the great importance of the research and study that goes on behind the Iron Curtain, I will expect there will be a very substantial flow of communication both ways, incoming and outgoing, in that [fol. 64] direction. There also may be—again judging by what other Presidents have done—a considerable amount of being asked for advice and consulted by scholars from all over the world, who either should be invited to come to

the United States or for whom arrangements should be made to have the results of their research published here or other places.

Q. Does this mean then that you expect as President to further their interests?

A. Instead of replying with a "yes", which I could, I would like to elaborate in a few sentences. I further expect to further the interest of research, and if what is needed is to render any assistance to any scientist, who is creative, original, or promising, I would expect to do that.

Q. What forms would you expect this to take, based on past experience?

A. May I counter with some examples?

Q. Yes, please.

A. Manuscripts are being submitted by authors from all over the world. Those manuscripts have to be evaluated and recommendations have to be given on whether they are worthy of publication or not. Sometimes they contain the nucleus of very valuable results. But whoever reads them has helpful suggestions to make. Those helpful suggestions are submitted to the authors. They are being defi- [fol. 65] nitely helped in that way. That kind of exchange of information improves the manuscript, which in the end is very often acceptable for publication in this country. That is one possibility. Creative, productive people from all over the world are very eager to come to the United States. Recommendations may have to be given inviting such people to the United States. That is another way of performing that function.

Now, those would be—may I ask, did your question refer strictly to the function of the President of the Institute, or would any other way of—

Q. The question went to the President of the Institute.

A. Strictly the President?

Q. Yes.

A. The President of the Institute is very often approached by such Federal agencies as the Academy of Sciences. He is asked for advice on invitations, on sending delegates from here to other countries, on exchange of visiting scientists; and that kind of opinion will have to be rendered.

Q. Is it entirely feasible that a representative of the Soviet Union might come to the United States at your urging?

A. It is feasible; it has happened many times before at the urging of other Presidents of the Institute.

Q. Is it entirely feasible that he may obtain information while he was here that he would not otherwise have?

A. Any scientific exchange is a two-way street, and the [fol. 66] answer to that question must be yes.

Q. Is it also feasible that that information might be put to the service of the Soviet Union on his return there?

A. It is entirely feasible.

Q. Professor, are you in any way connected with any professional journals?

A. I had been, until somewhat more than a year ago, editor of the Annals of Mathematical Statistics, the official periodical of mathematical statistics, the leading journal in the field.

Q. Would you describe for the Court the nature of this publication?

A. It is a periodical with issues appearing four times a year in which original research results are published in the field of mathematics, statistics, and the theory of probability. Articles containing new contributions to the science are published, or once in awhile very comprehensive expository articles covering a certain segment of the field. Articles are contributed by specialists in the field from all over the world. While the original issues twenty-odd years ago contained mainly publications originating in the United States, this has been changing as time went on. And an ever increasing fraction of the total number of articles come from abroad.

Q. Would you describe your duties as editor regarding [fol. 67] these articles?

A. Manuscripts were coming to me in the mail. I had to look them over to form an opinion in the field into which they belonged and form a preliminary judgment of their quality. Some were obviously not good enough to be published; those were returned to the authors immediately. Some looked like articles worth further consideration; those were assigned to one of a panel of specialists who then

served as a referee. He read the article in detail and returned it to me with comments. Those comments could be anywhere within the following range: it could be a recommendation to accept unconditionally as in the form in which the article was originally presented; the referee's report may have been a recommendation to reject outright—for example, because the results were not new, were already known. In most cases the referee's recommendation contained a number of constructive suggestions and criticisms, pointing out that certain things could be presented better or could be derived in a better way, or that some results presented by the author could even be improved. Those recommendations were then, together with a copy of the manuscript or without it, sent back to the author with a request for him to consider those recommendations, incorporate them into the manuscript and send in a revised version. That process very often went several times back and [fol. 68] forth until the manuscript was reformulated and revised into a form which met with the approval of the referee and the editor; in which case it was finally accepted for publication.

Q. Have you done this for authors who might come from the Soviet Union or some other Iron Curtain country?

A. Yes, it has been done, and the same procedure was applied in the case of such manuscripts as the one I described right now.

Q. Do you expect to continue doing this in the capacity of other than editor of the Annals of Mathematical Statistics?

A. If I am elected President I certainly would not return to the editorship because the Presidency is a time-consuming position. I do expect to continue what I have been doing for many years, to serve as a referee for manuscripts, for individual manuscripts as they come in; in which case I would perform a similar function. I would read in detail, formulate recommendations and suggestions for improvement, for revision, and return the manuscript with my referee's report to the editor who then would utilize those recommendations.

Q. Is it entirely feasible that the assistance you give Soviet authors might be used for military purposes by the Soviet Union?

A. I must repeat what I have said before. In this day and age any human thought can be used for military purpose, [fol. 69] and therefore, the answer must be, yes, it is entirely feasible. Of course, any such exchange of information goes both ways. So long as there is free exchange of thought anybody who receives thoughts can use them for his purpose.

Q. Professor Birnbaum, have you performed these editorial-type functions for manuscripts other than those published in the Annals of Mathematical Statistics?

A. I have served as consulting editor for commercial publishers, for one publishing firm in the East in particular, on a long term arrangement. And I have given recommendations on a considerable number of publications or books. One of those books in particular was a book written by a Hungarian mathematician and a member of the Hungarian Academy of Sciences. And I have urged the publisher, very often strongly, to obtain publishing rights for the English translation of that book, because I thought it would be a most valuable addition to the supply of books available in this country.

Q. Professor Birnbaum, could you tell us whether any of these people, with whom you have had associations are members of the Communist Party?

A. I have no positive information on that. The thought that comes to mind, though, is that if somebody is a member of the Academy of Sciences of a Communist controlled country, or if somebody has a high position in the academic [fol. 70] hierarchy of a Communist controlled country, or if somebody is being sent as a delegate to an International Congress by a totalitarian government such as the Communist Government, or if he is given permission to leave on an exchange professorship, he must have made his peace with his regime. So how—

Mr. Fuller: Pardon me, before you go on.

Would you repeat Counsel's last question? Not the answer, just Counsel's last question.

(Question, Page 20, Line 19 read by the Court Reporter.)

Mr. Fuller: I will object to that as being leading.

By Mr. Morris:

Q. Professor Birnbaum, do you know the political affiliation of any of the people who attended any of these Congresses and with whom you have associated?

A. I do not know with any certainty. But I can only observe that any scientist who is a member of an Academy of Science of a Communist controlled nation, or who is being sent by such a nation to an International Congress, or who holds a high position in the academic hierarchy of such a country, or who even is given permission to leave his totalitarian-controlled country for a visit abroad, that any such person must have established a good reputation with his government, must be in the good graces of his government.

[fol. 71] Q. What do you see is the benefit which flows from your associations with these people at the various Congresses?

Mr. Fuller: Object to that as being leading.

By Mr. Morris:

Q. Could you describe for the Court the value that you achieve from being in attendance at these Congresses and associating with these people?

Mr. Fuller: Same objection.

By Mr. Morris:

Q. Would you please go ahead and answer that and we will reserve the objection.

A. I consider it a duty of the scientist, a faculty member, a citizen who happens to be a scientist, to keep abreast of the most recent developments in his field. And that can only be possible by keeping in constant contact with other people in the same field of research no matter where on the globe located. Secondly, I consider it my duty to trans-

mit that information, that up-to-date information on the state of my art, to my students and to my colleagues.

Q. Pardon me, Professor Birnbaum. Have you transmitted the information that you have received from prior meetings to your students and to your colleagues?

A. In every form I could; by word, in writing, by publications, and by using it in my own research.

Q. Are you expected to report the nature of your associations to any group other than your colleagues?

A. Before I left for the International Congress in Edin- [fol. 72] burgh, which was four years ago, a representative of the Central Intelligence Agency contacted me. We had a conference in my office. And I was asked to preserve any information I may obtain through personal contacts with participants in the Congress, in particular those from the other side of the Iron Curtain, and to bring this information back to the Central Intelligence Agency when I came back—which was the case.

Q. Professor Birnbaum, have you ever had a leave of absence from the University of Washington faculty?

A. I spent one year as visiting professor at Stamford. I spent the last year in Europe, mostly at the Sorbonne University of Paris. I was invited to teach a graduate course and otherwise conducted my research. Those are the two main one-year leaves of absence in my record.

Q. Who were your replacements at the University of Washington during your absence?

A. There was no formalized replacement when I went to Stamford. During the last year my replacement here was a mathematician from Poland who had been previously professor in Warsaw, with whom I had considerable personal correspondence previously. As a matter of fact, the correspondence began when he sent to me, as editor, a manuscript. We continued that contact that developed into more of an exchange of correspondence on our research. And I [fol. 73] was quite instrumental in his being invited to spend a year on a visiting appointment at the University of Washington.

Q. Could you describe for the Court the role that you played in bringing him here?

A. My role was that I corresponded with him. He asked me whether I knew of a possibility of obtaining a visiting appointment in the United States. After some exchange of letters I suggested that I would be away from here for a year and that would produce a vacancy which he could fill since I feel that we worked very closely. I knew the value of the man. He is the author of a rather important book and a number of research papers. I recommended that he be invited for one year's appointment. The recommendation went through the usual channels at the University of Washington and so forth. His invitation was approved and extended through the usual channels and approved by the Board of Regents. He came here and spent nine months at the University of Washington.

Q. Professor Birnbaum, do you have any duties and obligations respecting the selection of personnel for the Department of Mathematics at the University of Washington?

A. I am a member of the Personnel Committee of the Department; the Department which now has close to fifty faculty members. The Personnel Committee consists of four men who meet at irregular intervals and consider candidates [fol. 74] for staff positions for the near future, which usually means the next academic year. That means that all candidates for faculty appointments are being presented to that group. Each of them supplies their list of background, publications, research, and achievements. That is then circulated among the members of the committee who study it and at the end meet and discuss it and vote to either yes or not recommend an appointment. And in particular that happens also with visiting appointments, such as the appointment of that man who replaced me, except in this case I initiated the whole procedure introducing his candidacy.

Q. How many members are there on the Personnel Committee?

A. Four.

Q. Do you play a significant role in the selection of personnel?

A. Excuse me. The Committee or I as an individual?

Q. Do you as an individual?

A. I cast one vote of four.

Q. Do you ever initiate proceedings to bring anyone?

A. Each of us brings in names of people of whom he has heard and proposes them for appointment. But those are four people who are active in their fields and know active and promising candidates, and come in with that kind of recommendations.

Q. Has the Department of Mathematics at the University of Washington ever have visiting professors from Com-
[fol. 75] munist countries?

A. Yes. Within the last few years we had three people on long term appointments from Poland, for example, and a number of short period visitors.

Q. Do you know if any were members of the Communist Party?

A. I would have to answer the same way I did before; that I have no certain knowledge, but I assume that anybody who has a high standing in the academic hierarchy in Poland, who is a member of an academic society, who is given a passport to visit abroad, must be in good standing with his government.

Q. Would you describe for the Court the nature and extent of your associations with these visiting faculty members?

A. Well, it started by the fact that in the case of such invitations the vote to invite these people was unanimous in the Committee, since all of these men were very outstanding in their field, and it was considered extremely desirable to have them here. After they came here they were asked to teach, usually, an advanced course for graduate students in their special field, which we in the Mathematics Department thought was the very best way of utilizing the visitor for the advancement of our students. In addition to that, these men participated in research, seminars; and there was a good exchange of specialized knowledge on the up-to-date, most recent, progress in their field.

[fol. 76] Q. Did any of them teach undergraduate courses?

A. To the best of my knowledge, no. But I must admit that I don't know the teaching schedule.

Q. Did you have association with these people?

A. May I correct my statement? My memory has been refreshed. The man who replaced me taught an undergraduate course.

Q. Thank you. Did you give visiting scholars the benefit of your knowledge in the area of mathematical statistics?

A. I had conversations with them which could be so described.

Q. Have they returned to their native lands?

A. The man who replaced me stayed in this country. As a matter of fact, he decided never to return to Poland. He burned his bridges behind him. He obtained an appointment at Columbia University, and he has now a permanent appointment at the New York University. One man is still here—and I don't know the answer, whether he will return or not. Another returned to his country, to Poland.

Q. What were the factors that you and the Personnel Committee took into consideration before extending an invitation to these visiting faculty members?

A. Their performance—

Mr. Fuller: Pardon me. I want to register an objection to this question as being leading.

By Mr. Morris:

Q. Could you describe the criteria of selection that the Personnel Committee actually used when selecting these [fol. 77] visiting faculty members?

A. The dossier on each candidate for appointment contains an outline of the education of the men, a list of publications, usually an evaluation of his standing in the profession by several people who are knowledgeable in this particular field, either from our own Department or elicited from other places where experts in the same field were willing to write that kind of an evaluation. And practically without exception it was the scientific achievement and scientific standing of the candidate that was considered in extending or not extending an invitation.

Q. Do you have any knowledge of any instance in which there has been an exploration of a candidate's loyalty to the State of Washington?

A. No.

Q. Do you have any knowledge of any instance in which there has been an exploration of a candidate's loyalty to the United States of America?

A. I don't know of any preliminary exploration of that kind.

Q. Were you directed by anyone at the University of Washington to apply any such standard?

A. A matter of clarification; before the loyalty oath issue or after?

Q. Well, have you been directed by anyone at the University of Washington at any time to apply any such standard?

[fol. 78] A. I have not been expressly asked, no.

Q. In your expert opinion as a professor of mathematics and a man with wide background, would you tell us how wide a latitude of association is necessary for a professor of mathematics to enjoy in order for him to discharge his professional duties as a professor of mathematics?

Mr. Fuller: Pardon me. I will object to the form of this question as leading.

By Mr. Morris:

Q. Professor Birnbaum, could you tell us whether the execution of a loyalty oath is a necessary condition for a professor of mathematics before he is allowed to pursue his professorial duties and obligations?

Mr. Fuller: Pardon me.

Would you read back that question, please?

(Question Page 29, Line 9 read by the Court Reporter.)

The Witness: It is my understanding that if the loyalty oath is upheld, if the law prescribing the loyalty is upheld, it will become a necessary condition in the sense that anybody who will not sign the oath will be dismissed.

By Mr. Morris:

Q. Is it your professional opinion that this is a necessary condition before a person can be a teacher of mathematics and professor of mathematics?

A. It is my opinion that it is in no way a significant [fol. 79] qualification for being a good professor of mathematics.

Mr. Fuller: I didn't want to interrupt while the witness was answering the question, but I will object to the form of the question as being leading.

By Mr. Morris:

Q. Professor Birnbaum, are you familiar with a notice of May 28, 1962 from Charles E. Odegaard, President of the University of Washington?

A. I want to make sure I refer to the same notice. Yes, I am familiar with it. With one correction, it was signed by Dr. Thieme. The notice of May 28 was signed—came from the office of the President and signed by Thieme.

Mr. Morris: Will counsel agree that the May 28 notice is Exhibit B, Paragraph 63 of the Plaintiffs' complaint?

Mr. Fuller: Yes.

By Mr. Morris:

Q. Professor Birnbaum, was this notice distributed to you at the University of Washington?

A. Yes, sir.

Q. Was it distributed to all employees of the University of Washington?

A. To my knowledge, yes.

Q. Professor Birnbaum, would you outline the nature of President Odegaard's notice as it affects you?

Mr. Fuller: Pardon me. I will object to the form of this question as being leading.

By Mr. Morris:

Q. Professor Birnbaum, would you describe the notice of [fol. 80] May 28 as it affects you?

Mr. Fuller: The same objection.

By Mr. Morris:

Q. Go ahead and answer it.

A. The notice described the legal situation and stated that I will be asked to sign what is commonly referred to as the loyalty oath; and that in case of refusal I will be given a hearing and then dismissed. That summarizes the effect of the notice for me.

Q. Professor Birnbaum, is it your understanding that the President asked you to sign a loyalty oath on May 28?

A. It is my understanding that he announced that I will be asked to sign a loyalty oath in the near future.

Q. Would you tell the Court who is the head of the Department of Mathematics at the University of Washington?

A. Professor Carl Allendoerfer.

Q. Has Professor Allendoerfer in any way asked you to sign the oath referred to in the May 28 notice?

A. Yes, I received a notice of June 14, 1962, asking me to sign.

Q. What was it that he asked you to sign?

A. He asked me—which was a ditto notice, which I may read:

"The loyalty oath forms, which must be signed according to state law, are now available in Physics 245. According to the regulations from the President's office these are to be signed and witnessed by a notary before October 1.

[fol. 81] "A list of campus notaries, whose services are free, is available in our office. Please return the signed forms to the Department office at your convenience."

Mr. Fuller: Do you want to mark this as an exhibit as long as he has read it here?

The Witness: Shall I turn it over?

Mr. Morris: We will put one in later.

Mr. Furaia: Has he read the entire notice into the record?

By Mr. Morris:

Q. You have read the entire thing?

A. Yes; not the date and caption.

Q. You mentioned earlier it was June 14?

A. Yes.

Q. The other one, I think, is a nullifying notice after the temporary restraining order.

Mr. Fuller: I think we might as well read the caption and get everything on there.

The Witness: "Department of Mathematics, June 14, 1962. To all faculty, graduate assistants, and staff." That precedes the text.

By Mr. Morris:

Q. Professor Birnbaum, were you asked to sign one oath or two oaths or three oaths, or how many?

A. There are two forms of the oath, and I was asked to sign both.

Q. Have you carefully examined the oaths which you have [fol. 82] been asked to sign?

A. Yes.

Q. Would you say that you are familiar with their contents?

A. Yes.

Q. Professor Birnbaum, do you understand the oath which you are expected to sign?

A. No.

Mr. Fuller: Object to that question as being leading?

By Mr. Morris:

Q. Professor Birnbaum, what are the requirements stipulated in the oath before you affirm or swear to the contents therein?

A. The oath requires me to swear or affirm that I have read the provisions of the law printed on the reverse side thereof; that I understand and am familiar with the contents thereof. And then the oath proceeds to spell out what assertions I make.

Q. Professor Birnbaum, do you understand the oath which you are expected to sign?

A. No.

Mr. Fuller: Same objection to the question.

By Mr. Morris:

Q. Professor Birnbaum, do you understand the statutes on which these oaths are based?

A. No.

Mr. Fuller: Same objection.

By Mr. Morris:

[fol. 83] Q. Professor Birnbaum, could you describe for the Court the problems that you have in understanding this oath?

A. The provisions of the law quoted in the oath contain a number of definitions which I have great difficulty understanding. The law defines a "subversive person"; it defines a "subversive organization". The quotes are in the law. And the law defines a "foreign subversive organization". All three definitions in the law are to me very difficult to understand. A subversive person is defined as either a person who commits certain acts or a person who abets, advises, or teaches, by any means any person. Then the phrasing continues. This causes me to wonder whether one can be a subversive person by contagion; a subversive person once removed, twice removed, three times removed, removed so many times that nobody can really tell whether he was not involved in aiding, abetting, advising or teaching by any means somebody who in turn did the same thing to somebody else. Until somewhere in that sequence there was a subversive person. That is one difficulty I have in understanding.

Also I don't know what it means that I would abet, advise, or teach by any means somebody. What comes to mind are instances such as I have quoted before, cooperation in various and scientific endeavors, or help, or aid, or advice given [fol. 84] in that Congress. Similarly—well, those are my doubts in connection with the definition of subversive persons. There are similar difficulties about subversive organizations. Again, the definition starts a chain of actions by which one may get involved after a number of steps, which

I can not foresee, with something that is a subversive organization. The definition of the foreign subversive organization is so general and vague that it brings to mind the following situation: If I were elected to corresponding membership in the Czechoslovakia Academy of Sciences, I fear I would become a member of a foreign subversive organization in the meaning of the law.

Q. Professor Birnbaum,—

A. (Interposing) Those are my difficulties in understanding the provisions of the law.

Q. Professor Birnbaum, do you have a specific fear that this statute might be applied to you as you tend to understand it? I am seeking another form of question whereby we might obviate the last objection.

A. I take the matter of signing of an oath extremely seriously.

Q. I don't believe you have understood me, Professor. I wanted to know if you had any specific fear of signing this oath?

A. My specific fear would be that by signing a statement that I understand the provisions of the law, I would by this fact itself commit perjury. It is very specific.

[fol. 85] Q. Professor Birnbaum, do you take seriously the demand that you execute these oaths?

A. Very seriously.

Q. What do you mean when you say "very seriously"?

A. Very seriously because I would understand that by signing that oath I would not only assert that at the moment of signing the oaths I have not been involved in any of the activities I assert not to carry out, but I also would consider myself bound for the future not to engage in those activities. And if I were to comply with that assurance for the future, I would feel that I am very severely restricted not only in my freedom, but in performing what I consider my duty. And I would like to repeat what I said before: my duty as a citizen, as a scientist, as a teacher, as a member of the faculty of the University of Washington. I consider it my duty—and I again would like to summarize what I have said before—to keep abreast of the most recent developments in my field; to transmit them to my students and colleagues; to be able to stimulate original research

among the people with whom I am in touch here at the University of Washington and other colleagues in this country; to avoid the waste of time and effort which would be involved in duplicating research which is being carried out somewhere else; to see to it that if there is anywhere a scientific break-through I and my colleagues and people [fol. 86] with whom I keep in touch here know of it as soon as possible.

Q. Professor Birnbaum, could you sign this oath and continue in the activities which you have described here?

A. I could not.

Q. Professor Birnbaum, how many total questions are contained in this oath, do you know?

A. I don't know the answer.

Q. Professor Birnbaum, will you sign this oath?

A. No.

Q. Professor Birnbaum, could you tell the Court approximately when you received tenure at the University of Washington?

A. Approximately three years after the acting attribute was removed from my title, which means about 1943.

Q. Professor Birnbaum, could you tell the Court whether your salary is in excess of $10,000 a year?

A. It is.

Mr. Morris: Mr. Byron Coney will continue the examination.

By Mr. Coney:

Q. I will just have a few questions. Would you say, Professor Birnbaum, that mathematics is an expanding science today?

A. Very much so.

Q. Does the Soviet Union,—or do mathematicians in the Soviet Union and other Iron Curtain countries make signifi- [fol. 87] cant contributions to that science?

A. The United States and the Soviet Union are the leading countries in mathematical progress today. And some other countries behind the Iron Curtain, of those I have mentioned Poland, Hungary, Czechoslovakia, are very active also.

Q. Would you say then that contact with these people in the Soviet Union in your field is important or unimportant?

A. It is completely basic and fundamental to keeping up in my field.

Q. Would it be an advantage or disadvantage to the University here to sever contact with those people?

A. It would be a deterioration of a major caliber of the level of mathematical research here.

Q. Do you believe, Professor Birnbaum, that recruitment procedures at the University of Washington, and advancement procedures were adequate to insure that the best people were hired or advanced?

Mr. Fuller: Object to the form of the question as being leading.

By Mr. Coney:

Q. Go ahead and answer.

A. I think recruitment procedures and advancement procedures were entirely competitive with those in other state universities of comparable quality.

Q. Do you believe that the requirement of this particular loyalty oath that we have been referring to adds or detracts [fol. 88] from those recruitment and advancement procedures?

Mr. Fuller: Same objection to this question.

By Mr. Coney:

Q. Go ahead and answer.

A. It detracts immensely.

Q. In what respects?

A. It will make it impossible to invite or hire foreign citizens because of some provisions of the loyalty oath. It will make the positions on the faculty of the University of Washington appear undesirable to many scientists who are citizens of the United States but feel that the kind of scientific contacts I have described previously are indispensable to performing their duties. It will discourage candidates of that kind from either applying or accepting positions.

Q. In your experience, sir, do you believe that there is any justification for this oath?

Mr. Fuller: Objection as being leading.

The Witness: I believe there is no justification for such an oath.

By Mr. Coney:

Q. Do you believe that requiring this oath of faculty members would inflict damage on the University?

Mr. Fuller: Same objection.

The Witness: I believe that it would inflict a very serious damage to the University of Washington.

By Mr. Coney:

Q. Would you describe what that damage would be?

[fol. 89] A. The damage would be the loss of visiting faculty members and research scientists from abroad; the curtailment of exchange of information between members of the faculty of the University of Washington and scientists who by interpretation of the law may be subversive persons; by discouraging a very large number of possible new members of the faculty from coming to the University of Washington.

Q. In particular the Mathematics Department, do you feel this is true?

A. In view of what I know about the Mathematics Department and the structure of mathematics as an active science today, I think it would be emphatically true for the Mathematics Department.

By Mr. Morris:

Q. Could you execute this oath and continue to keep abreast of scientific developments in your field?

Mr. Fuller: Object to this question as being leading.

The Witness: My ability to keep abreast would be very significantly limited. The answer is no, I could not.

Q. Could you execute this oath and transmit to your students and colleagues the information that you think

essential in order to equip them under the duties and obligations that you have as a professor?

[fol. 90] Mr. Fuller: Same objection.

The Witness: My ability to do so would be significantly restricted and limited. The answer is no.

By Mr. Morris:

Q. Professor Birnbaum, in light of your past testimony, could you execute this oath and assimilate the up-to-date research which is being done both in this country and in the Soviet Union?

A. My ability to assimilate original and up-to-date research would be significantly limited. The answer, with that explanation, is no.

Mr. Morris: That is the extent of our questions, Mr. Fuller.

Cross examination.

By Mr. Fuller:

Q. Professor Birnbaum, have you ever signed an oath for the University of Washington?

A. Yes, I have.

Q. And when did you sign that oath?

A. To the best of my recollection immediately preceding my first appointment in 1939.

Q. Have you signed any oath subsequent to that time?

A. At the University of Washington?

Q. At the University of Washington, yes.

A. I am almost sure I have not. I have to make that qualification.

[fol. 91] Q. When had you planned to leave for the Congress which you described?

A. I have an appointment with the Office of Naval Research in Washington, D. C. on Wednesday, July 12, and my travel papers assign me to a military air transport plane out of Baltimore on the afternoon of Wednesday July 12. I have travel orders to board the plane on July 11. I have an appointment with the Office in the morning and I fly off in the afternoon of the same day, July 11.

Q. When will you return to the United States?

A. Around September 10.

Q. Now, if you were not to make the trip, your position with the University of Washington would in no way be in jeopardy; is that correct?

A. In no way in jeopardy.

Q. Actually, so far, Professor Birnbaum, you haven't really refused to sign the oath. You have until October 1st?

A. That is correct, yes.

Q. Now, there is one thing I wish to ask you about in your complaint. Perhaps before I ask this question I should state for the record that at the time of trial we intend to object to this line of testimony as being irrelevant. But I do wish to ask certain questions in the event the testimony is admitted, so that our questions will be admitted along with the testimony.

[fol. 92] Mr. Morris: Could I ask which line of testimony you are referring to?

Mr. Fuller: The entire line of testimony except for his position. We stipulated as to the position he holds in the University.

Mr. Coney: The deposition is taken pursuant to the Federal Rules and that preserves your rights.

Mr. Fuller: I wish to make the statement on the record.

Q. Professor Birnbaum, in your Complaint you have alleged that the Defendants concede the oath serves no useful purpose; and that it does in fact inflict wide-spread damage; and that the requiring of the oath from you among other plaintiffs is only because they believe the statute requires them to. Would you tell me what you base this upon, please?

A. I have heard of such statements being made by members of the administration. But I would rather refer to counsel because I personally—I as an individual have no direct knowledge of that opinion of the Defendants.

Q. That includes all of the Defendants, right? You have no knowledge?

A. No direct knowledge from direct conversation with anyone of the Defendants that this is their opinion.

Q. Have you ever seen any statements signed by any of [fol. 93] the Defendants which would give you grounds to so allege in your Complaint?

A. I have not seen such a statement by the Defendants.

Q. Then the allegation is made on the basis of hearsay, is that correct?

Mr. Coney: I object to that question. You can't ask the layman whether something is hearsay or not.

By Mr. Fuller:

Q. Let's say on the basis of what others have told you, other than the Defendants.

Mr. Coney: Again that is a question he has already answered. He has told you where he got the information and what the extent of it is.

By Mr. Fuller:

Q. Go ahead and answer that, if you will, Professor. Then you can maintain your objection.

A. It has been accepted as common knowledge among the faculty that this is the opinion of the Defendants. But I can only repeat that I have neither heard it directly from any of the Defendants or seen a written statement signed by any of the Defendants.

Q. You cannot refer to any specific fact or statement upon which this so-called common knowledge would be based; is that correct?

A. I am not stalling. I am trying to recall. I have been told by various people who spoke to top members of the [fol. 94] University Administration, and reported to have heard such statements. I cannot recollect at this moment the names of the people who told me so.

Q. Do you recall whether the people referred to by these people were among the Defendants in this lawsuit?

A. Well, I will run through the list of Defendants. No, I cannot recall.

Q. Also in the Complaint you stated: "But for the mandatory nature of the statute Defendants would not require such an oath inasmuch as Defendants believe as Plaintiffs

do, and it is a fact, that existing recruitment and promotional procedure at the University is already adequate to protect legitimate public interest without the necessity of the oath." Now, bearing in mind this portion of the allegation, would you tell us what sort of a check there is other than the oath in connection with the Personnel Committee you serve on, as to whether an individual belongs to a subversive organization?

A. There is an attempt to assemble as much information as one can on the personal history; on the family situation; on the education and the background of the candidate for appointment. There is, as far as the Personnel Committee is concerned, no specific effort directed at uncovering whether a candidate is a member of whatever may be defined as a subversive organization.

[fol. 95] Q. The next question relates to a statement which you made during your testimony. I believe you said that it was your understanding that if you refused to sign the oath that the result would be a hearing then dismissal. Now, directing your attention to this statement of yours, which I have tried to state as well as I could from recollection—I made notes at the time, but I won't say the words were in exactly that order, but that is the essence of what you said—on what do you base the latter part of your statement; the statement that after your hearing dismissal would follow?

A. Well, on the very last paragraph of the notice, of the printed notice from the office of the President, dated May 28, 1962. Pardon me. I would like to extend it. The entire statement between—on the second page, beginning, "If any member of the faculty . . .", and so on.

Q. Now, which particular part of this, Professor, leads you to believe that your dismissal as the result of the hearing would be automatic?

A. I don't think I said "automatic". I think a hearing will be granted. But my understanding of this statement of the regents quoted in the notice of the 28th of May, my understanding is that a hearing would only have one possible issue under consideration: Has the faculty member with tenure violated the provisions of the law which says [fol. 96] that if he violates it, namely by refusing to sign,

he must be dismissed. There is no other issue possible for consideration at that hearing.

Q. Your opinion, then, is based solely upon this printed document and nothing else?

A. Upon reading of the statement, yes.

Q. Do you think that it would be consistent with this statement for a hearing to be held and for you to state before the Hearing what you have stated today; for the Hearing Board Members to agree with you that it might be difficult for you to sign the oath under those circumstances and agree to retain you without your signing the oath? Do you think that is at all a possible result of the statement you have referred to?

A. I do not think that this statement leaves that latitude.

Q. You are a citizen of the United States, aren't you, Professor?

A. Yes.

Q. Now, referring to the statement that you read into the record by Professor Allendoerfer, it is your understanding, isn't it, Professor, that nothing that was in the Allendoerfer communication derogates in any way what was in the May 28 communication; isn't that correct?

A. That is correct.

Q. Now, referring to the exchange professor or the visit-[fol. 97] ing professor—I am not sure of his title—who took your place while you were away, do you know whether the source of his funds were from State sources or Federal sources, or do you know?

A. I am almost sure it was from State funds, but I am not quite sure.

Q. Referring to your membership in these various professional organizations, would it be fair, Professor Birnbaum, to say that on the whole your membership and activities in these organizations are a benefit to the State and to the United States of America rather than a detriment?

A. I should like to say yes.

Q. Are you encouraged to belong to these organizations by the State Department or any other branch of the Federal Government?

A. I think that the support that the Federal Government is giving to my activities implies encouragement to do what I have been doing.

Q. Now, at the conclusion of this deposition, Professor Birnbaum, you will, I understand, give your itinerary to counsel so in the event we have written interrogatories it would be possible for you, from abroad, to comply with these and to mail them back, is that correct?

A. I will give an itinerary as soon as it will be established, which will be within a day or so.

[fol. 98] Q. Thank you.

Professor Birnbaum, in view of the fact that you have signed an oath which was required by the 1931 Statute, am I right in thinking that your objection is solely to the oath required by the 1955 Statute?

Mr. Coney: Excuse me. If I remember what Professor Birnbaum said, he didn't say he signed the oath required by the 1931 Statute. All he said was that he signed an oath in 1939, without mentioning pursuant to what that oath required or what that oath contained.

By Mr. Fuller:

Q. You can answer the question.

I appreciate that, but I think—

Mr. Coney: You recited his testimony erroneously, though.

Mr. Fuller: Read back the question on that.

(Question Page 49, Line 2 read by the Court Reporter.)

Mr. Fuller: Let the question stand.

The Witness: I have stated that I have signed an oath immediately preceding my original appointment to the University of Washington in 1939. I do not recall the precise wording of that oath, and it would be difficult for me at this time to say whether, if I were to look at it today with my experience and my professional activities of today, I would consider it objectionable or not.

[fol. 99] By Mr. Fuller:

Q. You have no recollection at all as to the form of that oath then?

A. I have a very faint recollection, not good enough to be able to answer; to give a specific answer.

Q. To the best of your recollection, acknowledging the fact that it is a faint recollection, what do you recollect that it concerned?

A. I think I can answer that question. I think that it was a fairly general statement of allegiance to the Constitution of the United States and to the State of Washington, and that I asserted in that oath to support and obey the laws of the United States and of the State of Washington. And that kind of a statement I would not object to today. But this is only a vague recollection of the wording of the oath.

Q. Now, you have had some security clearances by the United States Government, isn't that correct?

A. Yes, I have.

Q. And what sort of clearances have you had?

A. My present work with the Office of Naval Research is unclassified, requires no clearance. I have been cleared, last time to my recollection, by the Naval Ordnance Test Station at China Lake. And I think it was clearance on the Confidential level, but I am not completely sure.

Q. Did you ever fill out any statement or oath for the [fol. 100] United States Government in connection with these clearances?

A. I am sure I did fill in a lengthy statement which had to be notarized, which was signed under oath, yes.

Q. Do you recall if there was any question as to any organizations to which you belonged in the past or at the time of your signing of the oath?

A. To my recollection I had to state a list of organizations to which I belonged at that time, yes.

Q. Do you recall if the list was a so-called United States Attorney General's list?

A. It was not a list that was presented to me. There was a blank space in which I was to enter all the organizations to which I belonged. It was up to the Security Officer evaluating the form to form his opinion on the quality of those organizations.

Q. Aside from the oath which you signed shortly after accepting employment with the University of Washington, have you signed any other similar oath since then, except

for the matter you just referred to in your Government clearance?

Mr. Coney: Objection. Do you mean by the University or Federal Government?

Mr. Fuller: By anyone.

The Witness: I have made a number of statements under oath, for example whenever I applied for a passport.

By Mr. Fuller:

Q. Anything else?

[fol. 101] A. Not to my recollection.

Mr. Fuller: That is all, counsel.

Redirect examination.

By Mr. Morris:

Q. I have a few more questions I would like to ask you, please.

Do you know what the penalty is for filing a false oath?

Mr. Fuller: Read the question, please.

(Question Line 5 read by the Court Reporter.)

The Witness: I know what the penalty is for committing perjury, which is a very serious criminal offense.

By Mr. Morris:

Q. Is it your understanding that in light of your past and anticipated activities that you might run a risk of a perjury conviction were you to sign this oath?

Mr. Fuller: Objection as leading.

The Witness: Am I directed to answer?

Mr. Morris: Yes.

A. Yes, I understand so.

Q. Professor Birnbaum, given the penalty for filing a false oath would you be willing to run the risk of signing the oath that is required of you?

Mr. Fuller: Objection as leading.

By Mr. Morris:

Q. Would you answer?

A. The answer is no.

Q. What would be your reason for answering that way? [fol. 102] A. Signing the oath, with the understanding of its provisions as I have it now, would in my opinion amount to signing a false statement under oath. I do not wish to commit perjury. And regardless of the legal consequences I take an oath extremely seriously, and I would not want to take a false oath.

Q. What do you mean that you do not want to take a false oath?

A. It is a matter of conscience and nothing else.

Q. Do you feel that you understand this oath well enough to be able to tell whether you would be taking a false oath?

Mr. Fuller: Objection as being leading.

The Witness: I do not understand the wording of the oath well enough, and I feel that signing it would put me in a position where it would be quite likely that I would be committing perjury.

Q. What makes you say that you might perhaps be committing perjury?

A. The fact that I do not understand the oath is one. At the same time, since I do not understand it, there may be some interpretations of the oath according to which I may be submitting a false assertion under oath. There may be other interpretations in which my assertions would be true, but there is a risk of making false assertions under that oath.

By Mr. Morris:

Q. Professor Birnbaum, you testified earlier as to alter- [fol. 103] native ways which might be present at the University of Washington to check on the employe's loyalty other than a loyalty oath. Could you repeat, please, the alternative methods which you know to be in existence at the University of Washington other than the loyalty oath?

A. Well, the Tenure Committee as established by the Code could be called upon to inquire into the behavior, ac-

tivity, performance, of a faculty member, and could for a number of different reasons listed in the tenure provisions of the Code rule his dismissal.

Q. In your experience at the University of Washington have such hearings ever been held by the Tenure Committee?

A. Yes, they have.

Q. Could you describe these briefly for the Court?

A. They came as a consequence of what was known as the Campbell Committee Hearings. At that time evidence was brought up by the Committee, headed by Mr. Campbell, that some members of the faculty had been members of the Communist Party. That evidence was brought before the Committee of the Faculty. Recommendations were formulated by the Tenure Committee after very careful study and acting on those recommendations the then President of the University of Washington, to my recollection with the approval of the Board of Regents, ruled dismissal of those faculty members.

Mr. Morris: I have no further questions.

[fol. 104] Recross examination.

By Mr. Fuller:

Q. When was the last time you applied for a passport, Professor Birnbaum?

A. Less than a month ago.

Q. And did you apply before that time for a passport also?

A. For a renewal of a passport about three years before.

Mr. Fuller: That is all we have.

Mr. Morris: Counsel for Plaintiffs have no further questions.

Is it agreeable with counsel for Defendants, and the witness, Professor Birnbaum, that we waive the subsequent reading and examination of the deposition, as well as the subsequent signing of it by Professor Birnbaum, for the reason that he will be leaving Seattle and will not be present for the purpose of reading the deposition and signing it?

Mr. Fuller: No, that is not acceptable. We won't stipulate to that.

Mr. Coney: Professor Birnbaum, are you willing to waive signature of your deposition?

The Witness: I am willing.

Mr. Coney: That is it.

(Deposition concluded.)

[fol. 105]

CERTIFICATE

State of Washington,
County of King, ss.:

I, Louis R. Guevara, Court Reporter and Notary Public in and for the State of Washington, residing at Bellevue in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of the witness, William Z. Birnbaum, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting under my direction at Seattle, King County, Washington, on July 5, 1962, being completed on said day;

I further certify that the said witness waived the reading and signing of his deposition after the same was fully transcribed;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the above named witness, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth;

I further certify that said deposition upon oral examination, as above transcribed, is a full, true and correct tran-[fol. 106] script of the testimony of said witness, including questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am herewith securely sealing said deposition in an envelope with the title of the above cause thereon, and promptly delivering the same to the Clerk of the above-entitled court.

In Witness Whereof, I have hereunto set my hand and affixed my seal this 17th day of July, 1962.

Louis R. Guevara, Notary Public in and for the State of Washington, residing at Bellevue.

[fol.107] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

[Title omitted]

ANSWER—Filed July 19, 1962

Defendants, for answer to plaintiffs' complaint, admit and deny the various paragraphs thereof as follows:

1. Deny paragraph 1, but admit that plaintiffs may be relying on these specific statutory and constitutional provisions.

2. Admit the first two sentences of paragraph 2 but deny the third sentence because of lack of knowledge.

3. Admit paragraph 3.

4. Deny paragraph 4.

5. Deny paragraph 5.

6. Admit paragraph 6.

7. Admit paragraph 7.

8. Admit paragraph 8.

9. Admit paragraph 9.

10. Admit paragraph 10.

11. Admit paragraph 11.

12. Deny paragraph 12.

13. Deny paragraph 13.

14. Admit paragraph 14.

15. Admit paragraph 15.

16. Admit paragraph 16.

17. Admit paragraph 17.

18. Admit paragraph 18.

19. Deny paragraph 19.

20. Admit paragraph 20.

21. Admit paragraph 21.

[fol. 108] 22. Admit paragraph 22.

23. Admit paragraph 23.

24. Admit paragraph 24.

25. Admit paragraph 25.

26. Admit paragraph 26.

27. Admit paragraph 27.

28. Admit paragraph 28.

29. Admit paragraph 29.

30. Admit paragraph 30.

31. Deny paragraph 31.

32. Deny paragraph 32.

33. Admit the first sentence of paragraph 33 but regarding the truth of the second sentence, allege that they are without knowledge or information sufficient to form a belief.

34. Admit paragraph 34.

35. Admit paragraph 35.

36. Deny paragraph 36.

37. Admit paragraph 37.

38. Admit paragraph 38.

39. Admit paragraph 39.

40. Admit paragraph 40.

41. Admit paragraph 41.

42. Admit paragraph 42.

43. Admit paragraph 43.

44. Admit paragraph 44.

45. Admit paragraph 45.

46. Admit paragraph 46.

47. Deny paragraph 47.

48. Admit paragraph 48.

49. Admit the first sentence of paragraph 49. Allege that they are without sufficient knowledge or information to form a belief as to whether he is a citizen of Australia. Deny [fol. 109] that he is "Acting" Executive Officer of the Anthropology Department.

50. Admit paragraph 50.

51. Admit paragraph 51.

52. Admit paragraph 52.

53. Admit paragraph 53.

54. Admit paragraph 54.

55. Admit paragraph 55.

56. Admit paragraph 56.

57. Deny paragraph 57.

58. Admit paragraph 58.

59. Admit the first two sentences of paragraph 59. Deny the third sentence as phrased.

60. Admit paragraph 60.

61. Admit the first two sentences of paragraph 61 but deny the third sentence as phrased.

62. Deny the first sentence of paragraph 62; admit the second, third, and fourth sentences of paragraph 62. Deny the fifth sentence of paragraph 62. Admit the sixth sentence of paragraph 62. Deny the seventh sentence of paragraph 62. Admit the eighth sentence of paragraph 62.

63. Admit paragraph 63.

64. Deny paragraph 64.

65. Deny paragraph 65.

66. Deny paragraph 66.

67. Deny paragraph 67.

68. Allege that they lack sufficient knowledge and information to form a belief as to the truth of the first sentence of paragraph 68. Deny the remainder of paragraph 68.

69. Deny paragraph 69.

70. Deny paragraph 70.

71. Deny paragraph 71.

72. Deny paragraph 72.

[fol. 110] 73. Deny paragraph 73 as phrased.

74. Deny paragraph 74.

75. Deny paragraph 75.

76. Allege that with regard to the truth of the first sentence, they lack sufficient knowledge and information as to form a belief. Admit the second sentence. Deny the third and fourth sentences.

77. Deny paragraph 77.

78. First Defense

That the judgments and decisions referred to by plaintiffs in paragraph 62 of their complaint are res judicata as to the defendants and the plaintiffs with tenure in the present action.

79. Second Defense

That not one plaintiff has in fact refused to take the oath; that the bringing of the present action is premature.

80. Third Defense

That there is no justiciable controversy between the plaintiffs and the defendants.

Wherefore, defendants pray that the court dismiss plaintiffs' complaint with prejudice, declare the statutes attacked constitutional, deny the prayer for an injunction and award the defendants their costs.

Herbert H. Fuller, Attorney for Defendants, Deputy Attorney General, 216 Norton Building, Seattle 4, Washington.

Proof of service (omitted in printing).

[fol. 111] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DIVISION OF WASHINGTON

NORTHERN DIVISION

No. 3598

[Title omitted]

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[fol. 113] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

[Title omitted]

PRETRIAL ORDER—August 30, 1962

As the result of the pretrial conference heretofore had, whereat the plaintiffs were represented by Arval Morris, Kenneth A. MacDonald and Byron D. Coney, and the defendants by John J. O'Connell and Herbert H. Fuller, their attorneys of record, the following issues of fact were framed and exhibits identified:

Jurisdiction

1. Jurisdiction is vested in this court by virtue of the fact that this is a civil action in which the matter in controversy arises under Section 1 of the Fourteenth Amendment to the United States Constitution, and under Article 1, Section 10 of the United States Constitution, and allegedly exceeds the value of $10,000 exclusive of interest or costs. Likewise this is a civil action to redress the alleged deprivation under color of State law of rights, privileges and immunities guaranteed by the United States Constitution. Jurisdiction is founded in 28 U.S.C. Sections 1331 and 1343 (3) and 42 U.S.C. Section 1983.

Admitted Facts

The following facts are admitted by the parties and may be received into evidence without objection:

1. The University of Washington is one of two state universities and is primarily located in Seattle, Washington. It is wholly owned and operated by the State of Washing-

ton. It employs many thousands of persons and offers academic, scientific and professional education in numerous fields to more than 25,000 persons annually. Through its professors and other teaching personnel it engages in the [fol. 114] instruction of students and in research.

The total budget of the University of Washington for the biennial years of 1961-1963 amounted to $99,996,000.00. This sum of money was derived from several sources. The following figures have been rounded off; hence, they will not total 100% exactly. The legislature of the State of Washington provided 55.9% or $55,908,000.00. In recent years, the percentage share of funds coming from the state legislature has been decreasing. The second largest percentage is 21.1% or $21,118,000.00 entitled "research grants." The source of these funds is primarily from the federal government and private contract research. In recent years, their percentage share of the total budget has been increasing. The remaining budgetary items are: 5.6% of the budget or $5,537,000.00 of teaching hospital income; 7.2% or $7,183,000.00 from self-sustaining auxiliary enterprises, e.g., evening class program, dormitories, etc.; the University of Washington Press is included in this category but it is not completely self-sustaining; 6.5% or $6,526,000.00 from student tuition, fees and charges; 2.5% or $2,500,000.00 from contract research overhead; .9% or $881,000.00 from Department Sales and Services; .3% or $342,000.00 from other miscellaneous income.

The University of Washington is older than the State of Washington. The University was organized in 1861. The Territory of Washington became a state in 1889. Prior to its admission as a state, the governmental powers exercised by the Territory of Washington were founded upon the Federal Act establishing the Territorial Government of Washington; see 10 Stat. 172. When the State of Washington was admitted to the Union in 1889, the governmental powers were transferred from the Territorial to the State government.

The Washington Constitution provides the present constitutional basis for the University of Washington in Article 13, relating to state institutions:

"Educational, reformatory and penal institutions, those for the benefit of blind, deaf, dumb . . . and such other [fol. 115] institutions as the public may require shall be fostered and supported by the State, subject to such regulations as may be provided by law. The regents . . . of all such institutions existing at the time of the adoption of this Constitution . . . shall be appointed by the Governor, by and with the advice and consent of the Senate . . ."

The University of Washington is presently divided into the several schools and colleges, listed below, and offers programs leading to degrees in specific fields:

1. The Graduate School;
2. The College of Architecture and Urban Planning;
3. The College of Arts and Sciences;
4. The College of Business Administration;
5. The College of Education;
6. The College of Engineering;
7. The College of Fisheries;
8. The College of Forestry;
9. The School of Nursing;
10. The College of Pharmacy;
11. The School of Social Work;
12. The School of Librarianship;
13. The School of Law;
14. The School of Medicine;
15. The School of Dentistry.

[fol. 116] *The Graduate School*

The Graduate School of the University of Washington is administratively in charge of graduate study in whatever division of the University such study is undertaken. This

involves the supervision of student programs which go beyond formal undergraduate work or work of the professional schools into areas of advanced training, research, and scholarship.

Programs for the master's and doctor's degrees are offered in fifty-eight departments within twelve schools and colleges in the University. The graduate faculty is composed of faculty members in these divisions who are engaged in graduate instruction or in directing the research of graduate students.

The Graduate School is administered through the Office of the Dean, the Executive Committee of the Graduate School, Group Operating Committees, and the Graduate Faculty Council. The Graduate Faculty Council is composed of representatives elected to eight Group Operating Committees by the departments and colleges that offer graduate work and it serves as the legislative and policy-making body of the graduate faculty. The Executive Committee consists of the Dean of the Graduate School and the elected chairman of each of the eight group Operating Committees; it acts as an advisory group to the Dean and as an administrative committee for the Graduate Faculty Council.

Research is of particular concern to the Graduate School, and instruction at the graduate level is largely guidance in research. Almost every phase of the graduate student's career is dominated by the research ideal; his thesis is an exercise in research; he acquires languages as research tools; his seminars are for training in research methods; and he obtains the doctor's degree for demonstrated proficiency in research.

The volume of research activity at the University is impressive and adds the richness of graduate instruction and study. Through contract research, for both private sources and government agencies, the work of the University has [fol. 117] been greatly expanded. This work not only brings greater research results but also provides more opportunities for the training and support of future scholars.

The administration of research interests in the Graduate School is carried out through the assistance of a special

research committee, appointed by the Dean, which reviews proposals for research support, formulates regulations concerning personnel and the use of funds, and stimulates interest in investigative activities. It advises on expenditures from the Initiative 171 Fund, which helps to support research in medicine and biology, and from the Research Fund of the Graduate School, which supports research primarily in the fields of the arts, humanities, and social sciences.

The Agnes H. Anderson Research Fund for the support of creative research was formed from the proceeds of a very generous gift donated by two anonymous friends of the University. Accepted by the Board of Regents in 1943, the fund is named in memory of the donor of Alfred H. Anderson Hall and the Agnes Healy Anderson Forestry Trust Fund. The selection of research projects and allocation of funds for their support are recommended to the President of the University by the Dean of the Graduate School after consultation with a committee of the University Research Society.

The Friday Harbor Laboratories, the marine laboratories of the University of Washington, are administered by the Dean of the Graduate School. The staff of the Laboratories is made up of professors from various Departments of the University (Botany, Fisheries, Meteorology, Oceanography, and Zoology) and visiting professors from other institutions.

The Friday Harbor Laboratories are located approximately eighty miles north of Seattle near the town of Friday Harbor on San Juan Island. This island is one of the largest of the 172 which make up the San Juan Archipelago located in the northwest section of the state of Washington between Vancouver Island and the United States mainland.

The islands of the San Juan Archipelago are, in general, rocky, wooded, and with precipitous shores. Many are [fol. 118] deeply indented by narrow, fjord-like inlets. They have been strongly glaciated leaving valleys filled with drift and occasional lakes, swamps, and sphagnum and peat bogs. The Laboratories are located on a state game preserve of 484 acres of wooded land with about two miles of shore

line. This is an admirable location for the study of various aspects of marine science and for many types of investigations.

Within a relatively short distance from the Laboratories are sea waters varying from oceanic to those highly diluted by streams, with depths to 1,000 feet, bottoms varying from mud to rock, and water movements ranging from those of quiet bays and lagoons to those of swift tideways.

The waters about the San Juan Archipelago have exceptionally abundant and varied marine flora and fauna. The area is rich in both phytoplankton and zooplankton. Brown, green, blue-green, and red algae are present in quantity.

Representatives of all major and most minor phyla of invertebrates can be collected within a reasonable distance from the Laboratories. Shore collecting and dredging in the many diverse ecological situations provide an abundance of forms for ecological, experimental, morphological, and systematic work.

The biological laboratory buildings are provided with aquaria and running sea water supplied through either polyethylene or glass pipes and fittings which deliver water free from metallic contamination.

During the summer the Laboratories offer an opportunity for independent and supervised research as well as a varied program of instruction primarily for graduate students (exceptional, advanced undergraduates are occasionally admitted). The program of courses usually includes work in algology, oceanographic meteorology, oceanography, invertebrate zoology, invertebrate physiology or embryology. Throughout the year, the use of the facilities of the Laboratories for research in various areas of marine science is encouraged.

The University of Washington Board of Regents, in January, 1958, established the Laboratory of Radiation [fol. 119] Biology to expand University studies of the biological effects of atomic radiation. (The Laboratory absorbed and supplanted the Applied Fisheries Laboratory established in 1943.) The Laboratory is a division of the Graduate School.

The program is planned to meet the need for trained specialists in the field of radiation biology, in which the

physical and biological sciences join forces to combine the skills of the two areas of learning.

Graduate students wishing to enter the field of radiation biology should hold degrees in the biological sciences with supporting course work in physics, chemistry, and mathematics, or in the physical sciences of chemistry or physics with supporting courses in the biological sciences.

A research training program, which is integrated with the courses in radiation biology, is carried on by the Laboratory of Radiation Biology, under contract with the Atomic Energy Commission, at the Pacific Proving Ground, the Fern Lake Research Station, and in the laboratories at the University of Washington.

The Research Computer Laboratory, established in September, 1956, as an agency of the Graduate School, provides electronic calculating facilities and auxiliary punched-card equipment for use by faculty and research personnel of the University. The facilities of the Research Computer Laboratory are also available to neighboring institutions which do not have their own computers.

The IBM 650 is now operated as the chief facility of the Laboratory. The University plans, however, to expand the facilities to include an IBM 704 Computer and necessary auxiliary equipment.

The Research Computer Laboratory is administered by a faculty advisory committee under the chairmanship of the Dean of the Graduate School.

One of the newest facilities available for study through the University of Washington is the Center for Graduate Study at Hanford, located at Richland, Washington. Formerly the General Electric School of Nuclear Engineering, the operation of the School was assumed by the University July 1, 1958. It is administered by the Graduate School at [fol. 120] the University of Washington in Seattle.

The School serves the professionally trained people working at the Hanford Atomic Products Operation and in the general area, who wish to obtain advanced degrees. In addition to the courses which have been offered in previous years, the University will broaden the programs to approximate more closely the advanced degree programs available on the Seattle campus. Currently upper-division and gradu-

ate-level courses are available in business administration, chemistry, mathematics, physics, radiology, and in chemical, electrical, mechanical and metallurgical engineering. Classes at the Center are presently held only in the evening and most of the students and staff are employees of the Atomic Energy Commission's prime contractor, the General Electric Company. As the program is expanded, greater utilization will be made of the Hanford facilities and faculty members from the University and other institutions.

The University of Washington Press, a division of the Graduate School, is the publishing arm of the University. It publishes scholarly books of both specialized and general interest, and original works in the arts, whether written by members of the faculty or by qualified persons outside the University. It also handles textbooks and the publications of certain University laboratories and bureaus. The Press manages all details of editing and design of its products, and buys its printing and binding on a contract basis.

The Administrative Committee of the Press assists the Dean of the Graduate School in general administration of the Press. This Committee also screens the manuscripts offered to the Press and recommends to the Publications Council selected manuscripts for publication. The Publications Council passes upon the recommendations of the Administrative Committee and promotes the interests of the Press. Individually, the members of the Council represent the various publishing interests of the University and encourage their colleagues to submit manuscripts to the Press.

The Walker-Ames Fund was founded in 1931 by Maud Walker and her husband, Edwin Gardner Ames. Its purpose was to enable the University of Washington "to guarantee to the State of Washington the scholarly and educational services of the most distinguished minds available in this and other countries . . ." Since the first Walker-Ames visiting professor was appointed in 1936, well over one hundred notable scholars have come to the University as temporary members of the faculty and have enriched the intellectual life of the University community.

[fol. 121]

In 1956 there was created within the Walker-Ames Fund an annual All-University Lectureship designed to bring to

the campus each year, for a single lecture, a person equipped by experience and learning to discuss a topic of importance to modern society.

The Graduate School offers programs leading to the master's degree through the following schools and colleges: *Architecture and Urban Planning; Arts and Sciences:* anthropology, art, botany, chemistry, classics, communications, drama, economics, English (including general and comparative literature), Far Eastern and Slavic languages and literature, geography, geology, Germanic languages and literature, history, home economics, mathematics, meteorology and climatology, music, oceanography, philosophy, physical education, physics, political science (including public administration), psychology, Romance languages and literature, Scandinavian languages and literature, sociology, speech, and zoology; *Business Administration; Dentistry; Education; Engineering:* aeronautical, chemical, civil, electrical, mechanical, and mineral engineering; *Fisheries; Forestry; Librarianship; Medicine:* anatomy, biochemistry, microbiology, pharmacology, physiology and biophysics, and surgery; *Nursing; Pharmacy;* and *Social Work.* An interdepartmental program in *Linguistics* is administered by a special committee.

Programs leading to the Doctor of Philosophy degree are offered through the following schools and colleges: *Arts and Sciences:* anthropology, botany, chemistry, economics, English (including general and comparative literature), Far Eastern and Slavic languages and literature, geography, geology, Germanic languages and literature, history, mathematics, meteorology and climatology, music, oceanography, [fol. 122] philosophy, physics, political science, psychology, Romance languages and literature, sociology, speech, and zoology; *Education; Engineering:* aeronautical, chemical, civil, electrical, and mechanical engineering; *Fisheries; Forestry; Medicine:* anatomy, biochemistry, microbiology, pharmacology, and physiology and biophysics; and *Pharmacy.* An interdepartmental program in *Linguistics* is administered by a special committee.

A program leading to the degree of Doctor of Business Administration is offered through the College of Business Administration. This is a professional degree primarily for students preparing for teaching and research positions in

business administration and for administrative and policy-making positions in business.

A program for the degree of Doctor of Education, a professional degree primarily for teachers and school administrators, is offered through the College of Education.

To qualify for a master's degree, the candidate must meet these requirements:

1. Present at least 27 credits of course work successfully completed. Half of the work for the master's degree, including the thesis, must be in courses numbered 500 and above.

2. Present a minimum of three full-time quarters of residence credit. (Part-time quarters may be accumulated to meet this requirement.)

3. Present a certificate of proficiency in a foreign language (unless specifically excepted for a particular degree).

4. Prepare a thesis which is approved by the department (unless specifically excepted in a particular program). Credit for the thesis ordinarily should be one-fourth of the total credit for the degree. Students must register for thesis. The number of credits indicated in such registration should be the proportion of the normal load which the student is devoting to the thesis. The thesis should be evidence of the candidate's ability to do independent investigation and to present the results in clear and systematic form.

5. Satisfy any additional requirements the major department imposes.

[fol. 123] While every candidate is expected to take some work outside his major department, the major department determines the requirements for supporting courses and should consult with the minor department in planning requirements for the minor.

The doctor's degree is by nature and tradition the highest certificate of membership in the academic community. As such it is meant to indicate the presence of superior qualities of mind and intellectual interests and of high attainments in a chosen field. It is not conferred merely as a certificate to a prescribed course of study and research, no matter how long or how faithfully pursued. All require-

ments and regulations leading to the doctor's degree are devices whereby the candidate may demonstrate his present capacities and future promise for scholarly work.

In order to qualify for the doctor's degree, the candidate must meet the following minimum requirements:

1. Complete a program of study and research as planned by the major department or college, of which half, including the thesis, must be in courses numbered 500 or above.

2. Present a minimum of three academic years of resident study, two of them at the University of Washington with at least one year in continuous full-time residence. (The continuous year may be satisfied with three out of four consecutive full-time quarters.)

3. Demonstrate a reading knowledge of two foreign languages related to the major field of study. (Language requirements for the Doctor of Business Administration and the Doctor of Education degrees are slightly different.)

4. Prepare a thesis which is a significant contribution to knowledge and which clearly indicates training in research. Credit for the thesis ordinarily should be one-third of the total credit for the degree.

5. Pass creditably a general examination in the major field and, when a part of the program, in the minor field or supporting courses.

6. Pass creditably a final examination, which is usually devoted to the thesis and the field with which it is concerned.

[fol. 124] While every candidate is expected to take some work outside his major department, the department itself determines the requirements for minors and supporting courses.

Not later than the end of the second year of the student's graduate work, the major department will request the Graduate School to appoint a supervisory committee, which will include a graduate faculty representative, to assume general sponsorship of the prospective candidate. At the end of two full years of graduate study as approved by the major department, and after a successful demonstration of

proficiency in two foreign languages, the chairman of the supervisory committee may present to the Graduate School for approval a warrant permitting the student to take the general examination for admission to candidacy. This is taken by the Graduate School to mean that, in the opinion of the committee, the student's background of study and preparation is sufficient to justify his undertaking the examinations. No student is regarded by the Graduate School as a candidate for the doctor's degree until after the warrant certifying the successful completion of the general examinations has been filed with the Graduate School Office by the chairman of his supervisory committee. After his admission to candidacy, the student ordinarily devotes his time to the completion of his research work as embodied in the thesis, and to preparation for his final examination.

The candidate must present a thesis representing original and independent investigation; it should reflect not only his mastery of research techniques but also his ability to select an important problem for investigation and to deal with it competently.

When the supervisory committee believes that the doctoral candidate is prepared to take his final examination, the Graduate School is asked to designate a thesis-reading committee from among the members of the supervisory committee. Using forms provided by th Graduate School, the reading committee prepares a report briefly summarizing the distinctive work of the thesis, the methods used, and the results. If the report is favorable and is presented to the [fol. 125] Graduate School two weeks before the final examination date, and if the candidate has met all other requirements, a warrant authorizing the final examination is issued by the Graduate School.

The thesis report is not binding upon the examining committee, but is intended to insure that, except for minor alterations, the dissertation is ready for final presentation. The Graduate School returns the thesis report to the supervisory committee together with the warrant for the final examination, and upon approval by the examining committee at the time of the final examination, it is bound with the dissertation.

If the final examination is satisfactory, the supervisory committee signs the Graduate School's warrant and returns it at least two weeks before the end of the quarter in which the degree is to be conferred. If the examination is unsatisfactory, the supervisory committee may recommend that the Dean of the Graduate School permit a second examination after a period of further study.
[fol. 126]

2. *The College of Architecture and Urban Planning*

Inaugurated by action of the Board of Regents at the instigation of the Washington State Chapter of the American Institute of Architects, the Department of Architecture was established in 1914. In 1935 the status was changed to that of School of Architecture in the College of Arts and Sciences.

The College of Architecture and Urban Planning was recognized as an autonomous unit of the University in July, 1957. At that time Prof. Arthur P. Herrman, Director of the School of Architecture since 1937, was appointed Acting Dean, and in April, 1958, was appointed Dean.

A member of the Association of Collegiate Schools of Architecture since 1925, the College is also accredited by the National Architectural Accrediting Board. It is also a member of the newly formed Association of Collegiate Schools of Planning. While accreditation procedures have not yet been set up for urban planning, this College has been "recognized" by the American Institute of Planners for membership purpose.

The College of Architecture and Urban Planning offers three five-year programs, each leading to a bachelor's degree. Architecture has been offered since 1928, Urban Planning since 1941, and Landscape Architecture since 1960. The College also offers programs leading to the degrees of Master of Architecture and Master of Urban Planning.

The College of Architecture and Urban Planning offers curricula in three professional areas related to the human environment: architecture, landscape architecture, and urban planning. Though there is a certain amount of close

relationship among the three disciplines, each makes its own distinct contribution. In these creative fields, the hope is to sharpen the student's perception, stimulate his imagination, give him a method of approach, and inspire him to the highest degree of professional competence. The goal is the continuous improvement of the physical environment of human beings through the creative talents of architects, landscape architects, and planners.

[fol. 127] One of the primary concerns of architecture is the study of the perceptual quality of shelter and environment. The ideal is to produce the best possible physical space and artificial climate for people, and, that environment should satisfy the function of the design. Architecture must possess the element of beauty—its aesthetic delight is as fundamental to good architecture as its function. Advances in technology and changes in social and economic conditions present a constant challenge to the profession, warranting a continuing search for a more precise performance.

To create a mental image of a structure and then to translate it into a workable building requires a special combination of carefully developed abilities and techniques. The architect is the person in whose mind the image of the building takes shape. The successful architect should be a well educated person. He must possess the sensitivity and skill of the artist, have a clear understanding of structure and materials, and have a wide knowledge of the activities and desires of people. An architect is much more than a technician—he must acquire competence in design, which is emphasized in the course of study and taught by the use of the project method.

The objective of the graduate program in architecture is to explore the possibilities for a finer architecture which grow out of a deep and intensive knowledge of the relationship among the technical, sociological, economic, and aesthetic influences significant to architectural form. To accomplish this, the suggested graduate study leading to a Master of Architecture degree is of an individual exploratory nature, thereby allowing a competent student to formulate a program of study and research which will enhance

his development and contribute to architectural advancement.

Landscape Architecture is the art and science of planning land for human use and enjoyment. It involves the design disciplines of architecture, art, and sculpture; engineering principles of earthwork, grading, and surveying; and the planning processes of natural resource conservation.

[fol. 128] A degree of Bachelor of Landscape Architecture is offered in a five-year program. The first two years are devoted to general education with emphasis on the natural sciences and basic approaches to "design". The first two years of the Architecture curriculum may be substituted. The final three years are built around a core of Landscape Design reinforced by service courses in Botany, Engineering, Forestry, etc.

The case study method is used in the design of public areas, urban redevelopment projects, and even individual residences. The curriculum is concerned with the restoration and the recreation of new environments where the natural has been damaged, but a major emphasis will be on the conservation of natural landscape values.

Urban planning is a relatively new profession, but it has gained considerable recognition, as it is increasingly necessary to meet some of the development problems of a modern, growing society on a professional level.

Included in the many duties of the urban planner are research concerning the population, land uses and economic bases of cities, and the preparation of long range, comprehensive development plans. These plans include proposals for land use, transportation facilities, and community facilities such as schools, parks, and public buildings.

In order to help put his plans into effect the planner prepares zoning ordinances, subdivision regulations, municipal capital improvement programs, and proposals for slum clearance and urban renewal.

It is important that a professional planner have an integrated understanding of his community and of its purposes and problems. Therefore, the Urban Planning curricula are designed to acquaint the student with the political, physical, economic, and social structures of communities, the emerging problems of growth and decay, and the preventive and

remedial methods for meeting such problems on a professional level.

The Urban Planning curricula combine courses from a number of different fields such as political science, sociology, business, geography, civil engineering, and urban planning. These courses are coordinated by an advisory [fol. 129] committee composed of members of the participating colleges and departments.

Both a graduate and an undergraduate program are offered by the College of Architecture and Urban Planning. The undergraduate program is a five-year course of study which leads to a Bachelor of Urban Planning degree. The graduate program, which leads to the degree of Master of Urban Planning, normally covers a two-year period. The educational objectives of the undergraduate and graduate programs are similar in that both are concerned with techniques and methods of urban planning, but the emphases of the two curricula are somewhat different.

The undergraduate program is intended for the student who is primarily interested in the design and physical planning aspects of urban planning. Considerable attention is given to the elements of physical planning, including the development of useful and aesthetic patterns in space and structure, and of design precepts for large groups of buildings and entire cities.

The program commences with two years of preprofessional training which is common to the architecture and landscape architecture programs. In the following three years, the professional training progressively emphasizes factors affecting the use of land and other elements of the urban planning process.

The graduate program, on the other hand, is somewhat more concerned with broader areas of planning research and administration.

This program draws students from a variety of undergraduate backgrounds such as sociology, geography, political science, civil engineering, and architecture. However, selected "foundation," "urban study," and "technique" courses also are needed to provide a basis for the professional courses. Therefore, it is strongly recommended that

students planning on eventual graduate training in urban planning discuss their undergraduate college preparation with the Urban Planning adviser in order to be sure that they will have adequate preparation for their graduate study.

[fol. 130] Instruction in architecture and urban planning is centered in Architecture Hall. This building was erected as a permanent structure to be used as the Art Gallery for the Alaska-Yukon-Pacific Exposition in 1909. Architecture Hall, in addition to regular classrooms and staff offices, contains drafting rooms, seminar rooms, and a library.

Since research is an essential part of the study of architecture and urban planning, the library is closely integrated into the teaching program of the College. Located in Architecture Hall, the library is a branch of the main University Library. The collection includes 5,000 books; 2,300 pamphlets; 111 currently received periodicals; a large file of manufacturers' catalogs, brochures, and samples which provide data on all aspects of building fabrication; a number of trade magazines; a file of blueprints; 6,000 lantern slides; and 4,000 35-millimeter colored slides.

Literature on historic phases of architecture, its famous practitioners, past and present; the philosophy and theory of design, color, sculpture, drawing, lettering, mechanical and electrical equipment for buildings; materials and methods of architectural construction; city, county, and regional planning and landscape architecture is available for student use during the day and evening. Current and past issues of the most prominent architectural and urban planning periodicals of the United States and various other countries are also on file in the library.

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3. *The College of Arts and Sciences*

The first courses offered by the University when it opened November 4, 1861, were courses in fields now included in the College of Arts and Sciences. The Laws of 1863 provided that the University should consist of at least four departments: (1) a department of literature, science, and arts, (2) a department of law, (3) a department of medicine,

and (4) a military department. As the University grew, the study of the basic arts and sciences was organized within a college, first called the College of Literature, Science, and Arts, and later called successively the College of Liberal Arts, University College, and the College of Arts and Sciences (since 1939). Some former departments of the College have developed into separate colleges which apply the fundamental disciplines to particular professions.

Nevertheless, the College of Arts and Sciences is still the largest and most diversified of all the divisions of the University. It consists of the subject matter departments of anthropology, astronomy, botany, chemistry, classics, economics, English, Far Eastern and Slavic languages and literature, genetics, geography, geology, Germanic languages and literature, history, mathematics, meteorology and climatology, oceanography, philosophy, physics, political science, psychology, Romance languages and literature, Scandinavian languages and literature, sociology, speech, and zoology; the semiprofessional Schools of Art, Communications, Drama, Home Economics, Music, Physical and Health Education; and the Far Eastern and Russian Institute and the Division of General Studies, which offer interdepartmental courses and curricula. The departments and schools of the College offer almost one hundred curricula leading to the degrees of Bachelor of Arts and Bachelor of Science, as well as graduate study leading to the degrees of Master of Arts, Master of Science, and Doctor of Philosophy.

In spite of their seeming diversity, the units of the College of Arts and Sciences have a common objective: to pro- [fol. 132] mote the study of the basic arts and sciences by the students and faculty. The four-year undergraduate programs of the College are designed to translate this general objective into more specific objectives: to enable all of its students to acquire an understanding of man and the universe; to appreciate the intellectual and esthetic achievements of mankind; and to contribute as informed, rational, sentient beings, to the culture and progress of a changing world. The kind of education which serves these objectives is sometimes designated as "liberal"; it provides both breadth and depth of intellectual experience, not restricted

in its relevance to any vocational or professional application.

The basic programs offered by the College are constructed within a framework which preserves the tradition of liberal education. The objectives of the College, however, permit a wide variability in the educational aims of its students. Certain units of the College combine professional training with general college study, but any special goals of a professional or vocational nature are regarded as extensions of the basic bachelor's program. The faculty is deeply aware of the value of individuality to our society and is ready to assist students to develop programs which satisfy strong personal desires; yet the objectives of the College require some common patterns of study.

Several kinds of undergraduate degree curricula are offered in the College. *Prescribed* departmental curricula, offered by some departments and schools, definitely prescribe the work the student must complete for the bachelor's degree; *elective* departmental curricula are more flexible than prescribed curricula but require at least 36 credits in the major subject; *interdepartmental* curricula, given by the Division of General Studies, meet the individual needs of students whose major field of interest extends beyond the limits of a single department or college.

In addition to curricula leading to degrees in the College, the College provides curricula for the basic preparation of students who plan to enter into professional training offered by schools of dentistry, education, law, librarianship, medicine, and social work. These curricula vary in length from [fol. 133] one to four years.

Students who have not made a definite choice of a degree program before entering the University may select, in consultation with an adviser, a program of studies which will meet the general requirements of the College and at the same time provide opportunities to explore the possibilities of college study. Students may remain in this premajor category no later than the end of the sophomore year.

The College provides special opportunities for students of superior ability. Special sections of elementary courses and sequences of advanced courses for students who have

demonstrated special abilities in a single field of study have been available in the College for many years.

To provide further encouragement for the superior student, the College is initiating in Autumn, 1961, a four-year Honors Program which will combine general honors courses with honors sequences in the major field of the student. Freshman students entering in Autumn, 1961, are selected for the College Honors Program on the basis of their high school records and qualifying examinations; other students may enter the program during the academic year upon recommendation by the faculty and approval by the Honors Council of the College.

The Directors of Honors and the Honors Council will counsel students accepted into this program, and will arrange approximately one-half of their schedules in honors courses.

In addition to providing instructional programs for students whose major fields of interest lie in the departments and schools of the College, the College provides instruction to students in every other unit of the University. Those students who expect to enter the professional Schools of Law, Medicine, Dentistry, Social Work, or Librarianship find in the preprofessional programs of the College the means of advancing their general education while preparing for their professional training. Students enrolled in other undergraduate colleges of the University are often required to take a large portion of their work in courses given in the [fol. 134] College of Arts and Sciences, and may elect additional courses as their degree programs permit.

The College of Arts and Sciences offers a number of study, research, and cultural facilities which, while associated with one or more of the units of the College, have even wider significance as elements of the University itself.

The University libraries contain over a million books and acquire 65,000 more each year. They currently receive 17,000 periodicals. The Henry M. Suzzallo Library, opened in December, 1926, houses the main collection, the general catalog, the reference division and documents section, current periodicals, the science room, and the reserve book room; in addition, the Pacific Northwest Bibliographical

Center maintains a union catalog for libraries in Washington, Oregon, Idaho, Montana and British Columbia. Twenty branch libraries for special academic subjects are located in other buildings. Particularly notable among the library holdings are the books and manuscripts in the Pacific Northwest collection; works on oceanography, fisheries, and forestry; documents as a depository of the United States government, United Nation agencies, and the Canadian government; and materials in Russian, Japanese, and especially Chinese.

The Washington State Museum, for which a new building is under construction, contains natural history and anthropological collections of the Pacific Northwest, Oceania, and the Far East. Three University theaters, the Showboat, the Penthouse, and the Playhouse, are used throughout the year in the School of Drama program. Radio Station KCOW, an FM station operated by the School of Communications, and television station KCTS, a community-sponsored project with studios located at the University, are used both for student training and for public service in communications. The Henry Art Gallery offers a program of frequently changing exhibitions of recent work in painting, sculpture, printmaking, photography, and the craft media, film programs, musicales, and other special events.

Service-research organizations include the Bailey and Babette Gatzert Institute of Child Development, of the [fol. 135] Psychology Department, which provides clinical training for graduate students, conducts research, and offers consultative service, and the University Nursery School, maintained for nursery school teacher training, observations, and demonstrations. The Speech and Hearing Clinic, of the Department of Speech, offers remedial service to students and others with speech or hearing defects. Two bureaus conducting research in government and international relations are affiliated with the Department of Political Science. These agencies are the Bureau of Governmental Research and Services and the Institute of International Affairs. The Institute for Economic Research is a research organization affiliated with the Department of Economics.

Through the Language Laboratory, operated jointly by the language departments and the Film Center, it is possible

for students to practice hearing and speaking a foreign language at their own pace, in addition to class hours which are thus freed for explanation and discussion.

The Institute for Sociological Research and the Office of Population Research are maintained by the Department of Sociology. The cyclotron and the Cosmic Ray Laboratory are research agencies of the Department of Physics.

The Research Computer Laboratory of the Graduate School has two magnetic drum-type, high-speed computing machines which are used for research computations of all departments and research groups on campus as well as for laboratory work related to the undergraduate courses in numerical analysis and data processing.

The Friday Harbor Laboratories (under the administrative jurisdiction of the Graduate School) on San Juan Island, about eighty miles north of Seattle, provide unique opportunities for teaching and research in the marine sciences. During the summer, courses in algology, marine zoology, oceanography, meteorology, and fisheries are offered for advanced undergraduate and graduate students.

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4. *The College of Business Administration*

The College of Business Administration was established in 1917, and its growth has been as rapid as that of the Northwest. Since 1921, the College has been a member of the American Association of Collegiate Schools of Business. Today it has a senior faculty of 90 members, an undergraduate enrollment of 2,000 students, and a graduate enrollment of 250.

The curriculum receives continuing, critical review by the faculty, and departmental programs reflect the major revisions in undergraduate curricula approved in 1961.

The major mission of the College's undergraduate program is to provide students with a substantial background in the underlying fields of knowledge basic to responsible citizenship and essential to an understanding of business as an integral part of today's society. Education for business is perceived as a life-long, not a four-year, process,

and the curriculum is therefore designed to equip the student with the sound foundation needed to continue his learning experience after graduation.

The student learns, within this setting where major emphasis is on business—its specialized or functional areas—to view business as a segment of the whole of knowledge, with roots in the liberal arts and sciences. Approximately half his undergraduate work is in the communication arts and the quantitative, physical, and social sciences.

The College seeks to create and maintain an intellectual atmosphere conducive to the pursuit of knowledge for its own sake. It strives to encourage both faculty and students to push forward the frontiers of knowledge and to lead in the development of business thought.

The College's activities are centered in a new classroom building, and the faculty and administration offices are located in an adjoining staff building. In addition to regular classrooms there are accounting laboratories, a library, and seminar rooms arranged to fit the needs of particular types of instruction.

[fol. 137] The Business Administration Library is situated on the main floor of the Business Administration Classroom Building. It has seating for more than three hundred readers. The library has current materials on all phases of business, including books, newspapers, periodicals, pamphlets, government publications, annual reports, indexes, bibliographies, and loose-leaf services in finance, trade regulation, accountancy, transportation, real estate, corporate taxation, insurance, and labor and personnel. Conference study rooms are provided for students. Research offices are available for faculty.

The College maintains a Bureau of Business Research which is a member of the Associated University Bureaus of Business and Economic Research. The Bureau was established in 1941 to centralize the University's research in business and to serve business, industry, labor, government, and the professions. Publications include studies of Pacific Northwest, Washington, and Alaskan industries, communities, and general aspects of business administration.

The *University of Washington* Business Review is a journal published bi-monthly during the academic year (February, April, June, October, and December) by the College of Business Administration. The magazine serves as a means of disseminating information of wide interest to students of business, to the business community, and to other universities. Articles present significant results of business research; describe and evaluate trends and techniques in business administration and the business environment; and (in some cases) present regional business analyses. The magazine is distributed on a paid subscription basis to bureaus of business research and libraries of other universities.

The Production Laboratory provides demonstration facilities for use in production courses. In addition, the Laboratory is equipped to enable students to carry on individual research projects at graduate and undergraduate levels. Equipment, including primary machine and hand tools, is available for studies in motion and time, layout, and experimental testing.

[fol. 138] The College encourages students to supplement classroom training by obtaining experience in actual business situations. Selected students in accounting and marketing have an opportunity to work in industry while earning college credits.

Accounting majors, by special arrangement, spend one quarter with a certified public accounting firm, industrial organization, or government agency. At the completion of the work period, students submit written reports on their employment experiences.

The Marketing Department administers scholarship programs which are, in effect, cooperative training. These programs provide part-time work and training, enabling students to study policies, methods, and techniques. The programs give college credit to qualified students for reports on work experience.

[fol. 139] 5. *The College of Education*

The first teacher training in the state of Washington was given at the University by President Alexander J. Ander-

son (1878-1882), who conducted courses in literature, mathematics, astronomy, surveying, psychology, and pedagogics. However, despite efforts of the Board of Regents and the Superintendent of Public Instruction, there was no development of a University program, and President Anderson himself finally urged establishment of a state normal school. When normal schools were established at Cheney and Ellensburg in 1890, and at Bellingham in 1893, teacher training at the University halted altogether.

The general growth of the University between 1898 and 1914, during the administrations of Presidents Frank P. Graves and Thomas F. Kane, brought a new beginning for teacher training. A small Department of Education was developed, and in 1913 the faculty voted to establish a School of Education coordinate with other schools and colleges of the University. Dr. Frederick E. Bolton was appointed dean. In 1914 the School of Education became the College of Education, the first such college in any state university.

In 1929 the College administration was instrumental in obtaining action by the State Board of Education toward establishment of the five-year plan for the normal diploma. By 1933 the plan was in operation.

The College of Education offers programs for the preparation of teachers and for advanced educational study which represent the close cooperation of the academic and professional faculties of the University. An extensive schedule of classroom observation and supervised practice teaching is made available through cooperative arrangement with the public schools in the Seattle-King County area.

In concert with staff members in other colleges of the University, the staff of the College of Education seeks to achieve broad training in the liberal arts and sciences by providing a general education program, designed to develop the knowledge, understanding, skills, and abilities charac- [fol. 140] teristic of an educated person enjoying citizenship in a free democratic society.

The several programs offered by the College of Education present undergraduate and graduate courses designed to:

Help the prospective teacher develop competence and sophistication in one or more teaching fields, and, through study and practice, begin to develop proficiency in the actual teaching of those fields;

Introduce students to the study of education as a basic social institution and to the profession of teaching;

Insure the comprehension of growth and development in children, youths, and adults through research, observation, and direct experience;

Provide an understanding of the teaching and learning processes as they affect the selection, organization, presentation, and evaluation of curriculum materials and resources for various age levels and ability groups;

Promote and foster research and advanced study in the several branches of the field of education for which post-baccalaureate work is appropriate;

Assist each student in acquiring a workable philosophy of education and an appreciation of the ethical role of a professional educator in a free society.

Through the Bureau of School Services and Research, the College of Education provides a wide variety of professional services to the schools and communities of the state of Washington. Upon request, University faculty members from within and outside the College of Education are available for in-service training and to act in advisory capacities.

The College of Education Library, the first departmental library on the campus (1913), is a branch of the University's Henry Suzzalo Library and contains a well-rounded collection of books and periodicals on education and its related fields. Of particular interest are a curriculum collection and sample textbooks; pamphlet, test, and thesis files; and an interlibrary loan service. The facilities of the library [fol. 141] are available not only to students but to teachers throughout the Northwest.

The *College of Education Record* is published four times a year. In addition to book reviews, education news notes, and occasional College announcements, this journal contains articles on a variety of subjects for teachers and administrators.

Bulletins on the graduate degree program and the training of public school teachers keep students and educators acquainted with changes in these areas.

The College of Education cooperates with the State Department of Public Instruction and with school districts throughout the state in the training program for the Standard Certificate through in-service work, individual visits, and conferences with beginning teachers and their administrators. There is also a special observation, research, and practice program in the public schools of the Seattle area and in other nearby districts in which students teach for one quarter, working with a master teacher in a public school.

The College maintains an In-Service Teacher Training program in which University staff members cooperate with state school administrators and teachers in dealing with professional problems. Other services include curriculum workshops, held at the University during the summer and in some counties during the school year; informal help through letters, telephone calls, and visits.

[fol. 142]

6. *The College of Engineering*

In the spring of 1861 three forward-looking Seattle citizens, Arthur A. Denny, Judge Edward Lander, and Charles C. Terry, deeded ten acres of land for the establishment of a new university in what was then Washington Territory. Several months later, on November 4, 1861, the University of Washington opened the doors of a new frame building where the twenty-two-year-old "principal", Asa Shinn Mercer, began the instruction of thirty-one students, many of them young men recruited from nearby logging camps.

By 1889, when Washington was admitted to the Union, the University had achieved a consistent program and an enrollment of more than one hundred students. But it was clear that the original building would soon be inadequate and that the University would need more room for development. In 1891 the new University site, the present 600-acre campus between Lake Washington and Lake Union, was selected. The first of the new buildings, Denny Hall, was completed in 1894 and occupied for the first time in Sep-

tember, 1895, when the University's enrollment was 425 students. (The original campus is now the center of downtown Seattle. The Olympic Hotel stands on the ground occupied by the first University of Washington building.)

The plan to establish curricula in engineering was formulated at the time the University was preparing to move to its present campus. Instruction in mining engineering was authorized by the Regents in 1893 and the Catalogue of 1894-95, which listed courses in civil engineering, including surveying, descriptive geometry, hydraulics, irrigation, and strength of materials, also announced that instruction in electrical engineering was planned for 1895. It was not, until 1898, however, that the Department of Civil Engineering and the School of Mining Engineering were established on a firm basis with qualified faculty members. In 1901 the sporadic courses in electrical engineering were brought into a definite curriculum.

[fol. 143] The College of Engineering was recognized as a major unit of the University in 1899, when Professor Almon H. Fuller was appointed the first Dean of Engineering. The first engineering degree was awarded in 1900 in mining engineering. The first degree in civil engineering was awarded in 1901, the first degree in electrical engineering in 1902, the first degree in mechanical engineering in 1906, and the first degree in chemical engineering in 1907. The Department of Aeronautical Engineering was established in 1929 and its first degrees awarded in 1930.

In 1911 the School of Mines became the College of Mines, and in that year the Northwest Mine Rescue Station of the United States Bureau of Mines was established at the University. Later, in 1916, the Training Station was joined by the Northwest Experiment Station, a coal and non-metallic mining laboratory of the Bureau. The College of Mines remained a college until 1947, when it became the School of Mineral Engineering within the College of Engineering.

In 1955 there was established a graduate program in Nuclear Engineering leading to the degree of Master of Science in Engineering, and the first degree was awarded in 1958. An interdepartmental graduate program in Engineering Mechanics was initiated in 1961.

The College of Engineering, participating in the technological development of the Northwest, has shared the University's rapid growth. The College has a faculty of more than a hundred and fifty members. In 1960 some twenty-two hundred undergraduate and six hundred graduate students were enrolled in engineering curricula.

Engineers use the principles of science and of engineering to create things that people need or want, such as highways, machine tools, airplanes, gasoline, television, or city planning. Scientists discover new principles; engineers make them useful. The scientist studies a carefully isolated aspect of reality and develops theories concerning its behavior. He is interested in knowledge for its own sake.

The engineer deals with reality in its many aspects. He must not only be competent to understand and use the meth- [fol. 144] ods of science, but he must be able to use his ingenuity to devise a product or process that will be useful and economical. Moreover, he must assume professional responsibility concerning the safety and well-being of people affected by his work.

Assisting the engineer and the scientist is the engineering technician. His work is more practical and applied and requires about two years of post high school training in a technical institute or junior college. He works closely with the engineer to test models, to assist in their development, and to put engineering designs into production.

The truly qualified scientist usually must have a college education extending past the four-year bachelor's degree to the Doctor of Philosophy degree. The engineer with the bachelor's degree, on the other hand, is more immediately useful to industry for many technical positions. However, many engineers now need graduate study leading to master's and doctor's degrees, particularly if they plan to engage in research, in college teaching, or in creative design on a high professional level. Students with academic aptitudes should seriously consider at least a fifth year of specialization.

The College of Engineering offers educational programs in the various fields of engineering with five main aims: (1) to provide a strong undergraduate engineering education leading to the bachelor's degree and enabling some

students immediately to enter the engineering profession, (2) to provide a fundamental scientific and technical foundation for graduate studies, (3) to provide a stimulating program of graduate studies and research for students who have the potential to pursue such programs successfully, (4) to permit the outstanding student to realize his full capacities and develop those qualities which eventually will make him a leader in the profession, and (5) to inculcate in each student the desire to read, study, and progress professionally "on his own."

Although engineering education is aimed primarily at providing the scientific and technical foundation required for the profession, each curriculum includes courses in the humanities and social studies to broaden the student's knowledge, increase his sense of responsibility, and help [fol. 145] him live more effectively as an individual engineer and citizen.

In recognition of the responsibility of the University for the development of knowledge and the training of research personnel, the College has active graduate programs beyond the Baccalaureate in all engineering departments. The College has also developed an expanded research program at every level in these departments. Not only does this research advance engineering knowledge, but it is an integral part of the educational experience needed to qualify men for research and development positions, or for careers in engineering teaching.

The departments of the College of Engineering occupy seven major campus buildings: More Hall (Civil), Hydraulics Laboratory (Civil), Electrical Engineering Building, Roberts Hall (School of Mineral Engineering), Guggenheim Hall (Aeronautical and Humanistic-Social Studies), General Engineering Building, and Mechanical Engineering Building. In addition to numerous smaller isolated laboratories, substantial portions of the following buildings are also used: Bagley Hall (Chemical Engineering), and Engineering Shops (Mechanical Engineering).

Aeronautical Engineering

Equipment is available, or is presently under construction, for laboratory instruction and experimental investigations in the fields of aerodynamics, gas dynamics, magneto-hydrodynamics, elastic and inelastic structures and materials, high temperature and vacuum effects on materials and structures, heat transfer and wave propagation in solids.

The largest facility is the self-contained F. K. Kirsten aeronautics laboratory housing an 8 by 12 foot 250 mile per hour wind tunnel specifically designed for advance research projects and industrial testing. A hypersonic shock tunnel is located in a temporary self-contained facility.

All other laboratories are housed in Guggenheim Hall at this time with planned expansion into a new facility in the near future. These laboratories contain a fully equipped supersonic and subsonic testing facility with development underway of the gas dynamics and magneto-hydrodynamics [fol. 146] facilities. Adjacent to these, and as part of the instructional laboratory complex, is the structures and materials laboratory equipped to investigate elastic and inelastic behavior of structures and materials with the capability of producing high vacuum environments.

These facilities are maintained and expanded by a well-equipped machine, electronics, and model shop which is available to all students and staff engaged in experimental research. An instrumentation laboratory devoted to the study of systems is under development. Adequate computer facilities are available on the campus.

Chemical Engineering

The Department of Chemical Engineering is in Bagley Hall, where, in addition to laboratories for instruction in chemistry, a number of laboratories with extensive special equipment are provided for students in chemical engineering courses. The two-story chemical engineering unit operations laboratory contains equipment for study of fluid flow, heat transfer, evaporation, absorption, distillation, centrifuging, drying, filtration, and crystallization. Grinding and sieving equipment is in a separate room. A unit processes

laboratory has pilot-plant-size equipment for study of chemical processing. Complete equipment is available for study of paper pulping processes on a pilot-plant basis and for laboratory investigations of electro-chemistry. Machine, instrument, and glass-blowing shops staffed by full-time employees are maintained. A wide variety of special equipment for research is used by seniors and graduate students for thesis investigations, and branch library in Bagley Hall houses a special collection of reference books and periodicals.

Civil Engineering

More Hall, the civil engineering building, has modern structural, concrete, mineral aggregates, soil mechanics, bituminous, dynamics, and sanitary engineering laboratories. The structural laboratory contains a 2,400,000-pound testing machine with 120 inches between screws, a number of smaller machines ranging in capacity from 60,000 to 300,000 pounds, and complete electronic apparatus for stress and strain measurements. The concrete laboratory [fol. 147] has facilities for making, curing, and testing concrete specimens. The aggregates laboratory houses apparatus for testing the hardness, soundness, and wearing qualities of rock and for control of grading. The soil mechanics laboratory is of top rank in this field, and is equipped for all generally recognized tests encountered in foundation and earthwork engineering.

The bituminous laboratory contains apparatus for the usual tests required of asphaltic road building materials and is exceptionally well equipped for research in the design of stable bituminous surfacings. A complete sanitary engineering laboratory for the chemical, bacteriological, microscopic, and radiological analysis of water, sewage, and industrial waste is available for study and professional research. The Charles W. Harris Hydraulics Laboratory, on the shore of Lake Union, is equipped with the latest facilities for investigations and laboratory studies of many problems in experimental hydraulics and water power. It is supplemented by an outdoor laboratory for construction and study of models of river channels.

Electrical Engineering

The Department of Electrical Engineering is housed in Electrical Engineering Hall, a three-story building of modern design completed in 1948. All laboratories and most of the research facilities are included in the approximately 80,000 square feet of this building. Some classroom and office space is also provided in Mechanical Engineering Hall across the street. Most classrooms are designed to accommodate a maximum of 24 students each.

Laboratories include two large undergraduate laboratories in which most of the sophomore and junior work is done. A number of smaller laboratories are also provided in such specialized areas as microwaves, controls, fields, solid-state electronics, computers, servo-systems, acoustics, measurements, and transients, most of which are used by both graduate and undergraduate students.

A 44-acre site in the south end of Seattle provides a field [fol. 148] laboratory devoted to study of antennas, radio propagation, satellite reception, ionosphere measurements, etc.

Graduate students are usually assigned to one of the smaller laboratories or to a field site where they carry on research leading to a thesis, under the supervision of a graduate faculty adviser.

General Engineering

The Department of General Engineering occupies a new, centrally located, modern, four-story building, especially designed for the use of the first-year engineering student. Besides adequate classrooms and offices, the building contains a student reading and study room, a blueprinting room with a high-speed printing and developing machine, a shop for model building, and a lecture and motion picture auditorium seating 160.

Humanistic-Social Studies

The Department of Humanistic-Social Studies has its offices, classrooms, and library in Guggenheim Hall. Its library contains books in a wide variety of non-technical

fields, located on open shelves where they are readily accessible to those who wish either to study or browse. In addition to the usual audio-visual equipment, the Department maintains a library of records which are loaned to students either to play at home or on the Department's own equipment.

Mechanical Engineering

A new building, occupied in June, 1959, and containing 100,000 square feet, houses all of the activities of the department except those in manufacturing processes, which are located in an adjacent building. Approximately 15,000 square feet are devoted to laboratory instruction and research facilities for the study of engineering materials, experimental stress analysis, instrumentation, and vibration. All the usual physical testing equipment is available in these laboratories. The experimental stress analysis and non-destructive testing areas are especially well-equipped. The instrumentation laboratory contains facilities for the study of automatic control, including apparatus to demonstrate principles by electronic, pneumatic, and hydraulic analogs. A well-equipped instrument and [fol. 149] experimental shop is an adjunct of these laboratories.

Instructional and research laboratories serving the thermodynamics, gas dynamics, and heat transfer areas, occupy about 18,000 square feet and are equipped to exemplify the modern trends in heat power laboratory instruction and also to lend themselves to research. Substantially all of the equipment is new. Molten-metal and water heat transfer loops are housed in special quarters and are instrumented to be used effectively in undergraduate and graduate instruction as well as for research in nuclear reactor applications. Facilities are provided for instruction and research in the use of radiation-tracer techniques in lubrication and wear studies. Solar heat collectors and associated equipment are mounted on the roof of the building. Through cooperation of the United States Navy, rocket dynamometer test stands of the department are quartered at the Sand Point Naval Air Station, two miles from the campus.

The manufacturing methods laboratories are arranged and outfitted to demonstrate the basic principles of forming and fabricating engineering materials, and also to provide for laboratory exercises and research work in methods analysis, quality control, plant layout, and economic studies of production.

Mineral Engineering

The laboratories of the Ceramic Engineering Division are made up of five groups, the first of which contains facilities for grinding and classifying raw materials, mixing and tempering them, and forming these materials into shapes. The second group, principally in the Hewitt Wilson Ceramic Laboratory, contains the various kilns necessary for firing and testing ceramic ware. Included in these are a small scale continuous electric-fired tunnel kiln and a small rotary kiln. A larger rotary kiln of sufficient size for pilot-plant experiments is also available outside this building. A physical testing laboratory makes up the third unit, also in the Hewitt Wilson Laboratory. The fourth group is the coatings laboratory in which glazes for ceramic ware and coatings for materials are prepared, applied and fired. The research laboratory is the fifth of [fol. 150] these groups and contains the equipment needed for specialized undergraduate and graduate research including a supercentrifuge for sub-sieve particle size determination, thermal expansion unit, differential thermal analysis equipment, and petrographic microscopes for mineral identification and analysis and electro-dialysis equipment. For X-ray diffraction, the laboratory is equipped with the latest Norelco diffraction and fluoresecent analysis units by means of which either the direct reading techniques or camera technique can be employed.

[fol. 151] 7. *The College of Fisheries*

Throughout its history the University has taken an active and earnest interest in the natural resources of the Northwest. This interest is evidenced by the establishment of a curriculum in mining engineering in 1893, the College of Forestry in 1907, and the College of Fisheries in 1919. In

January of 1958, the Board of Regents of the University reaffirmed this interest and recognized the importance of fisheries to the economy of the area by incorporating the two fisheries groups on the campus, the School of Fisheries, and the Fisheries Research Institute, into the re-established College of Fisheries. Food Science was established as a college curriculum in 1960.

The College of Fisheries offers students an ideal balance of laboratory, classroom, and practical experience. The Fisheries Center houses the library, classrooms, laboratories, and general facilities as well as several research organizations. The building, constructed in 1949, is situated on the Lake Washington Ship Canal which connects Lake Washington, a large fresh-water lake, with the salt water of Puget Sound.

The College library contains material covering the subjects embraced by the fields of fisheries and oceanography, and is available for the use of students for class work and research. This library is supplemental by collections of the International Pacific Halibut Commission and of the Fisheries Research Institute. Excellent general and departmental library facilities are maintained at other locations on the campus.

To assist in research and for teaching purposes, the College maintains a collection of about 250,000 preserved specimens, coverings approximately 2000 species of fish from northern and southern oceans. As part of the practical experience and research program, the College has concrete fish ponds, connected to the Lake Washington Ship Canal by a fish ladder. Inside the Fisheries Center, an experimental fish hatchery and salt water aquaria provide facilities for students to study the entire life cycle of the Pacific Salmon as well as those other fresh-water and salt-water fish. The [fol. 152] Fish Behavior and Physiology Laboratory houses facilities for studying the behavior and swimming ability of fish.

In addition to the biological laboratories, there are complete laboratory facilities for both teaching and research in food science in the Fisheries Center. These include biochemical, microbiological and analytical laboratories, and

a processing laboratory equipped with canning, freezing, smoking, and other food processing equipment.

A 67-foot, diesel-powered boat, with cabin laboratory, is operated by the College. The vessel, the "Commando", is used for instruction and research in Lake Washington, Puget Sound, and the North Pacific Ocean. It is equipped with fishing gear for trawling, and for most other types of fishing used in the North Pacific.

Within two miles of the campus is located the headquarters of one of the Pacific Coast's largest fishing fleets. Puget Sound, in addition to its world-famous salmon and halibut fisheries, has extensive bottom fish, commercial oyster, clam, crab, and shrimp operations. Sports fishing, particularly for trout, is available in the Northwest's many lakes and streams. Full advantage is taken of the proximity of these natural resources in research and teaching.

The Friday Harbor Laboratories, on San Juan Island, about 80 miles north of Seattle, provide unique opportunities for teaching and research in the marine sciences. During the summer, courses in algology, marine zoology, fisheries, oceanography, and meteorology, are offered for advanced undergraduate and graduate students.

The Fisheries Research Institute was established by the University of Washington in 1947 to continue research, initiated in 1945 under sponsorship of the salmon industry, on red salmon in Alaska. In January of 1958 the Institute became the research branch of the College of Fisheries, responsible to its Dean.

It has conducted research in Bristol Bay, Southeastern Alaska, Kodiak Island, The Alaska Peninsula, and in Prince William Sound under various contracts, and, on behalf of the U. S Department of Interior, has carried out salmon [fol. 153] tagging programs in the Mid-Pacific in connection with the International North Pacific Fisheries Treaty between the United States, Canada, and Japan. Other research projects have included studies on sea lions, the effects of logging on salmon streams, and salmon migrations in Cook Inlet.

Research is facilitated by a large inventory of field and laboratory equipment. There is a large collection of special

literature and records such as maps, biological data on punched cards, statistical data on microfilm, and material on work in progress, all under the care and supervision of a librarian.

Besides its headquarters on the University campus, the Institute maintains five research stations in Alaska: two are in permanent shore buildings on Lakes Nerka and Aleknagik; one on floating barges at Igiugig in western Alaska, and two in Southeastern Alaska.

Offices are maintained in the Fisheries Center by the Washington State Department of Fisheries and the Washington State Department of Game. Members of the U. S. Fish and Wildlife Service are doing research on fish diseases, using Fisheries Center laboratories. The Laboratory of Radiation Biology, a national center for research in aquatic radiobiology supported by the Atomic Energy Commission, also has its quarters in the Fisheries Center.

In the city of Seattle are offices and laboratories of the U. S. Fish and Wildlife Service; and the headquarters of the International Pacific Halibut Commission is located on the campus.

[fol. 154] 8. *The College of Forestry*

The University of Washington College of Forestry was established in 1907, at a time when professional forestry education in the United States was in its infancy. The College began its program with a staff of two instructors and a class of ten students. Today, accredited by the 14,000-member Society of American Foresters, the College numbers 14 faculty, 280 students, and 1,850 alumni.

Since 1925, the College program has been centered in the main forestry building, Alfred H. Anderson Hall, where facilities include lecture rooms, laboratories, an assembly hall, student activity rooms, a Forest Club room, and the College Library. The building was a gift of Mrs. Agnes H. Anderson, whose husband was a pioneer lumberman and civic leader in Washington.

For over half a century, the College of Forestry has pursued the philosophy of its founders: that the important timber resource of the Northwest requires men especially

trained to harvest the forest crop efficiently and wisely, and men skilled in techniques of converting the raw material to maximal economic use. These goals are set forth in the following Statement of Policy and Objectives, adopted February 9, 1960:

Preamble:

The unusually large vested interests of the people of the State of Washington in the multiple-use of forest lands, and the increasing dependence of the state economy on advanced forestry practices and effective forest utilization, demand a dynamic program of forestry education and research. The University of Washington is uniquely located to lead this program because the concentration of diverse wood-using industries, and the forests, their products, and allied resources, provide the University with opportunities and responsibilities in all aspects of professional forestry instruction and in research.

Objectives

The objective of undergraduate professional education in the College of Forestry of the University of Washington is to provide the best professional instruction in the many aspects of forest management, logging engineering, forest products, and such other related areas of forestry as may be dictated by future developments.

The objectives of the graduate program of forestry are to make available the best academic guidance, re- [fol. 155] search facilities, and advanced professional education to foresters desiring intensification or specialization beyond the initial professional degree.

The objectives of the research program in forestry are to provide a medium of education primarily in graduate programs, to provide stimulus for professional growth by faculty, and to promote and execute fundamental forestry research.

Further general objectives include providing professional forestry leadership; the conduct of seminars, colloquia, short courses, and other similar media for

various professional and non-professional groups; and the dissemination of forestry information by methods appropriate to the University and College.

Because Seattle is in the center of the Northwest timber industry, forestry students here encounter at first hand the forest-management and forest-industry problems with which they will be concerned as foresters. Government forests and private timber holdings serve as laboratories and are regularly integrated into the four-year curriculum in which students study forest management and logging engineering in the field. Practicing foresters contribute to the laboratory instruction. Sawmills, plywood plants, pulp and paper mills, wood-industry research laboratories, and other wood-processing plants, all in close proximity to the College, provide field laboratories for student projects in the forest products curriculum. This favorable educational environment makes it possible to incorporate practical experience into the academic program.

The College of Forestry Library, a branch of the University's Henry Suzzallo Library, contains 10,000 bound volumes and 20,000 pamphlets, reports, and monographs. It also possesses an excellent collection of approximately 500 forestry periodicals and many indexes to current forestry literature. Under the nation-wide Farmington Plan, sponsored by the Special Library Association, it has assumed responsibility for collecting all foreign material published in the fields of forestry and pulp and paper technology. This facility provides unusual opportunity for academic research.

Two Forest Soils Laboratories, in Anderson Hall, serve a dual purpose as research and teaching aids in the College. In addition to enabling graduate students to study all types of forest-soil problems and thoroughly explore properties of forest soils, undergraduate students can become familiar [fol. 156] with important forest soil characteristics and with methods for analyzing forest soils.

Supplementing the Forest Soils Laboratories is a field laboratory at Pack Demonstration Forest, where less elaborate studies of forest soils and other problems are con-

ducted. These three laboratories have been important factors in expanding research on the growth of forest trees. Greenhouse space is also available through cooperation with the Botany Department.

The Herbarium supplements forestry students' field work in dendrology. The collection contains representative plant material from all parts of the United States, and includes dried mounted specimens of leaves, twigs, and flowers of the hardwood trees, and shrubs and twigs of the coniferous species. Fruit specimens and a complete cone collection of American conifers are maintained apart from the mounted collection. The Herbarium also provides authentic specimens for use in identifying woody plant material in many branches of forestry work. Another herbarium, complete in range plants, is maintained by the Botany Department and is available to forestry students.

The Wood Collection contains nearly 3,500 specimens from all parts of the world, providing authentic material for research and for identification of wood samples. The collection is valuable in the study of properties, characteristics, and uses of various woods, and provides material for studies of wood structure, both gross and microscopic.

Housed in its own building on the campus, the Forest Products Laboratory is equipped to conduct advanced studies of wood and wood products. Sections of the Laboratory are devoted to timber physics, woodworking, wood gluing, wood preservation, kiln drying, photomicrography, advanced wood technology, fiber board, and particle board. Testing machines, presses, machine tools, chemical apparatus, kilns, and mensuration devices permit almost unlimited experiments with wood.

A dry kiln for research and instruction in wood seasoning is situated adjacent to the Forest Products Laboratory. It [fol. 157] is equipped with modern instrumentation for remotely controlling the variables involved in the drying of lumber over a wide range of conditions. The 18-foot by 26-foot drying chamber is sufficiently large to reproduce conditions found in industrial-seasoning practice, yet not so large as to be unwieldy for conducting basic wood-drying research. Undergraduate students in forest products operate the kiln as part of their senior-year program.

The University Arboretum is a 267-acre park planted with trees and shrubs from all over the world. The diversified topography of the Arboretum, which produces varied soil and moisture conditions, and the mild climate of the Puget Sound region permit the growth of a greater number of species and varieties than is possible in almost any other area. The Arboretum is a ten-minute walk from the campus.

The Lee Forest is a tract of young timber in Snohomish County, near Maltby, about twenty-two miles from the University. The 158-acre property was deeded to the College of Forestry in the early 1930's by Mr. and Mrs. George O. Lee in memory of Mr. Lee's parents, Mr. and Mrs. O. H. Lee, Snohomish County pioneers. An experimental and demonstration farm forestry area, the Lee Forest is used for teaching and research in forest management, silviculture, ecology, and forest soils. A number of permanent study plots have been established, a study map made, and intensive growth measurements taken. During the winter of 1952 a first thinning was made in Douglas fir stands thirty-five and fifty-five years old.

The accessibility, stocking age, and site of the Lee Forest make it exceptionally valuable for studies and demonstrations of farm forestry practices applicable in western Washington.

The Charles Lathrop Pack Demonstration Forest, an enlargement and development of an original gift from the Charles Lathrop Pack Forestry Trust, is a tract of more than 2,300 acres. It extends along both sides of the Mt. Rainier National Park highway at La Grande, Washington, sixty-five miles from the University. The Pack Forest is an excellent field and research laboratory as well as a public demonstration project.

[fol. 158] Since 1928, when several permanent sample plots were established, research projects in various phases of silviculture, mensuration, and forest soils have been set up. Cooperative studies are being conducted with the Pacific Northwest Forest and Range Experiment Station.

Complete facilities for classwork and living accommodations are available to students and instructors working at the Pack Forest.

The Winnifred Denny Moore Memorial Forest is a recent gift to the College of Forestry from Dr. Raymond C. Moore, professor of geology at the University of Kansas. The 450-acre tract is situated in the eastern Cascade Mountains, about 20 miles northwest of Cle Elum, in the Boulder Creek area of the Wenatchee National Forest.

The tract is forested with ponderosa and lodge pole pine, spruce, and fir. It is especially useful for ecological studies in eastern Cascade timber types and for experimental plantings and land management studies in the high altitudes of Eastern Washington.

The Institute of Forest Products, which is housed in Anderson Hall, has three general objectives: (1) to provide students with increased opportunities for advanced study and research particularly in fields relating to products of the forest; (2) to provide for additional new and important research results especially in fields relating to forest products, and (3) to provide for increased University research cooperation with industry and government in fields relating to forest products. Predoctoral and postdoctoral research assistantships are available.

The Colonel William B. Greeley Lectureship in Industrial Forestry was established by the Industrial Forestry Association in 1956 to commemorate one of the nation's foremost pioneer foresters. With the funds provided by the grant, prominent industrial foresters are invited to the College during the Winter Quarter to conduct a special course in industrial forestry which includes public lectures and a series of seminars. The Lectureship serves as a memorial to a man who made great contributions to American forestry through his support of industrial forestry, tree farming, the Keep Green movement, and numerous other significant advances in forestry.

[fol. 159] 9. *The School of Nursing*

The University of Washington School of Nursing is an independent professional school within the Division of Health Sciences. It is an integral part of the University and its programs meet all University standards and requirements.

The School's origin in 1917 represented a pioneer effort in university nursing education. The first offerings consisted of a few service courses for graduate nurses. Under the leadership of Mrs. Elizabeth S. Soule the opportunities in nursing education were extended, and both undergraduate and graduate programs were developed. The Department of Nursing Education, which was established in 1921, became the School of Nursing in the College of Arts and Sciences in 1934. In 1945 it became an autonomous professional school in the Division of Health Sciences with Mrs. Soule as its first Dean.

During the 43-year history of the School, the curricular offerings have kept pace with the needs and trends of the nursing profession. A pre-service basic nursing program leading to the Bachelor of Science degree has been offered since 1921, and a baccalaureate degree program for graduate nurses since 1924. A graduate program leading to the Master's degree was approved in 1938. Affiliate courses in psychiatric and tuberculosis nursing for students from hospital schools of nursing have been offered since 1937.

All programs of the School, undergraduate and graduate, are fully approved by the Accrediting Service of the National League for Nursing. Both baccalaureate programs are approved for preparation for public health nursing.

The Division of Health Sciences of the University of Washington was established in the autumn of 1945 to include the Schools of Dentistry, Medicine, and Nursing, the College of Pharmacy, the Student Health Service, and the University Hospital. Each School or College within the Division of Health Sciences functions as an autonomous [fol. 160] unit. The Division coordinates development, research, and teaching activities to strengthen and reinforce the work of each unit.

The Health Sciences Building, which was completed in 1949, overlooks the Portage Bay Yacht Basin between Lake Washington and Lake Union. It houses the administrative units of the Schools of Dentistry, Medicine, and Nursing, classrooms, research and laboratory facilities, a library, and an auditorium. Future plans include a west wing to house the College of Pharmacy.

The University Hospital, which has a bed capacity of 300, was opened in May, 1959. It provides extensive in-patient and out-patient departments; thus, it is an excellent teaching and research facility for students in all health sciences fields.

The Health Sciences Library serves the schools and departments within the Division of Health Sciences, and is used by various other disciplines of the University. It has about 80,000 volumes (with stack space for 40,000 more), and subscribes to more than 1,500 periodicals. Library facilities include ten glass-panelled and soundproofed reading, study, and conference rooms, as well as adequate space for microfilm and microcard readers and special study groups. All other University library facilities are available to students and faculty members.

The School of Nursing acknowledges its responsibility for promoting complete nursing service for the people of the state of Washington through teaching, research, and public service. Complete nursing care embodies the recognition of the patient's physical, emotional, and spiritual needs. Kindness, tolerance, and understanding are essential to the fulfillment of a therapeutic patient-nurse relationship.

The School of Nursing believes that the qualified student brings to the professional school a background from which she makes her individual contribution to nursing. Opportunity for self-direction in the management of her own life is a part of personal and professional growth. Diversified interests promote cultural and emotional maturity. Breadth of academic background, which is gained through the use of all of the resources of the University, [fol. 161] contributes to fulfillment of professional responsibilities and personal interests. The physical, biological, and social sciences and the humanities are recognized as essential parts of the professional nursing curriculum.

Curricular offerings are planned to develop the professional nurse who is able to give complete nursing care within the framework of the physician's therapeutic design, to carry out nursing procedures skillfully and with understanding, to exercise discriminative judgment and insight,

and to assist in the prevention of disease and in the conservation of physical and mental health in her community. Better learning occurs where sound psychological principles are utilized. Correlated theory and clinical practice are offered in the care of the physically and mentally ill in the hospital and in the home and in teaching, treatment, rehabilitation, prevention, and health conservation for all age groups. Nursing experiences are planned to provide for continuity, sequence, and integration in all areas in order to effect gradual broadening and deepening of understandings, values, and skills. Individual counseling and supervision are directed toward helping the student to develop her personal and professional potentialities. This broad background of education followed by graduate professional experience prepares the nurse for advanced levels of service.

The School of Nursing believes that the professional nurse is characterized by the ability to give complete nursing care in all fields; to use the basic communication skills competently in organizing, planning, and directing the work of others; to cooperate democratically with allied professional and citizen groups for the improvement of total health services; to maintain her personal identity; and to attain individual satisfactions in her daily life at the same time as she serves her community. These responsibilities she accepts in contributing to nursing research, in upholding the ideals of the nursing profession, and in working toward its continued improvement and growth.

[fol. 162] In keeping with this philosophy, the School of Nursing works toward the attainment of the following objectives in the bachelor's curricula:

The School of Nursing endeavors to develop a nurse who is a mature, well-adjusted person capable of directing her own life, assuming responsibility for her own actions, and accepting her responsibility as a contributing member of social groups.

The School of Nursing endeavors to develop a nurse who is a professionally and technically competent person possessing an understanding of the physical, biological, and social sciences and the humanities essential to effective

nursing practice and who is skillful in meeting the nursing needs of the individual and community for care during illness and in the conservation of health.

The School of Nursing endeavors to develop a nurse who is a responsible professional person, as an individual and as a member of the health team, and who is capable of maintaining effective interpersonal, professional, and interprofessional relationships.

The School of Nursing endeavors to develop a nurse who is a responsible citizen capable of accepting her role as a contributing member of society and who is able to interpret her profession and professional activities to the community.

The School of Nursing endeavors to develop a nurse who is a creative individual capable of making her unique contribution to the improvement of nursing and who accepts responsibility for self-directed activity toward her own established goals.

The general philosophy of the School holds for graduate education in nursing also:

The School of Nursing believes that the University of Washington School of Nursing has an obligation to provide an environment and climate in which any professional nurse, who has met the entrance requirements of the Graduate School of the University and of the School of Nursing, may engage in study directed toward individual goals of [fol. 163] advanced professional competence; and that the curricula offered to candidates for graduate degrees, while containing a nucleus of required courses, should be sufficiently flexible to enable students to meet individual needs. Graduate education in nursing should enable the student to enlarge the view she holds of her profession and its relationship to society. Graduate study connotes that the student will increasingly assume independent responsibility for learning, scholarly investigation, and communication of the outcome of research.

The School of Nursing believes that it should promote and foster opportunities for individual, group, intra- and inter-disciplinary study and research, and for sharing the contributions which students engaged in graduate study can make to one another, to the School, and the profession.

The School of Nursing believes that the functions of the teacher in graduate education are to provide the environment and the climate within which the learner can learn, and to guide and counsel, and to share his knowledge with the learner.

The School recognizes that the objectives for the master's degree program are similar to those for the undergraduate degree program in content, but advance the level of competence which the learner should seek to attain. In order to qualify for a graduate degree every student should possess the ability to work effectively with others to meet the health needs of people and, since research in nursing is essential for the continuing growth of the profession, every student should increase the ability to use a scientific approach in solving nursing problems and to communicate findings in an appropriate manner. It is recognized that graduate study realistically must be directed toward intensive study in a selected area (or areas) of nursing and, therefore, the level of accomplishment in teaching supervisory or clinical skills, will vary for each student. Graduate study in any area of nursing implies that a student, regardless of age, kind or amount of experience, will be basically competent in nursing; it is, however, essential that a student who elects a clinical major for graduate study be basically competent in that clinical area.

[fol. 164] The School believes that the constantly-changing concepts and practices in nursing and the ever-increasing demands for nurses with graduate education support the convictions that: (1) the maximum freedom which is consistent with sound educational practice should be permitted graduate students in nursing in order that individuals with varying degrees of ability and experience may have equal opportunities to progress; and (2) that creative and critical thinking should be stimulated and disciplined by the study and practice of research methods, by conducting individual research and reporting findings.

The School of Nursing works toward the following objectives for graduate education in nursing:

Ability to work effectively with others to meet the health needs of people;

Ability to use scientific approach in solving nursing problems and to communicate findings in an appropriate manner;

Ability to perform skillfully in a selected area of nursing;

Ability to teach individuals and groups; and

Ability to use administrative skill.

The clinical teaching programs of the School of Nursing are conducted in a variety of hospitals and community agencies which cooperate with the School through making their facilities available for student instruction. In addition to the University Hospital, the School of Nursing uses the general facilities of King County Hospital System with a bed capacity of 450 in King County Unit I, and 220 in Unit II; Swedish Hospital with a bed capacity of 377; Virginia Mason Hospital with a bed capacity of 217; and The Doctor's Hospital with a bed capacity of 187. Special hospitals and agencies include the Children's Orthopedic Hospital with a capacity of 200 beds; Firland Sanatorium with a capacity of 1,086; and the state mental hospitals, Northern State Hospital, capacity 2273, Western State Hospital, capacity 3,007, and Eastern State Hospital, capacity 2,361. The psychiatric unit of the United States Veteran's Administration Hospital in Seattle, capacity 80 beds, provides an [fol. 165] additional facility in this area. Experience in public health nursing is arranged through the public health departments of Seattle-King County, Tacoma-Pierce County, Snohomish County, and the City of Spokane. Other community facilities are used as necessary to provide instruction for students.

[fol. 166] 10. *The College of Pharmacy*

The College of Pharmacy of the University of Washington was founded by the Board of Regents in July, 1894, and instruction was begun that autumn. The first year of instruction was given on the old campus in what was known as the "metropolitan section" of Seattle, before the University was moved, during the summer of 1895, to its present campus between Lake Washington and Lake Union. A

four-year curriculum leading to a bachelor's degree was established in 1904 and the present five-year curriculum was adopted in 1957. Graduate work was begun in 1912, with advanced study in preparation for the master's degree. Since 1925 the College has accepted candidates for the degree of Doctor of Philosophy with specialization in pharmaceutical chemistry, pharmacognosy, and pharmacy.

The College of Pharmacy is accredited by the American Council on Pharmaceutical Education. It is a member of the American Association of Colleges of Pharmacy.

The objectives of the College of Pharmacy are twofold: (1) The preparation for professional service of men and women who are academically and technically proficient in the basic sciences and their pharmaceutical applications, and who are educated in the liberal arts so that they may enjoy their cultural heritage and contribute to the betterment of society. (2) The advancement of knowledge, professional practice, and service through research.

The College of Pharmacy is a member of the Division of Health Sciences which was established in 1945. Included are the Schools of Dentistry, Medicine, and Nursing, the Student Health Service, and the University Hospital.

Each part of the Division of Health Sciences functions as an autonomous unit. The Division coordinates development, research, and teaching activities to strengthen and reinforce the work of each unit. For example, the Basic Sciences departments, meet the needs of the whole Division and of other departments of the University which [fol. 167] are concerned with work in anatomy, biochemistry, microbiology, pathology, pharmacology, physiology and biophysics, and public health and preventive medicine.

Instruction in pharmacy is centered in Bagley Hall, which houses pharmacy, chemistry, and chemical engineering. This building was completed in 1937 and was named for one of the founders of the University, Rev. Daniel Bagley.

Among the College of Pharmacy facilities in Bagley Hall are laboratories for pharmacy, prescription practice, manufacturing pharmacy, pharmaceutical chemistry, pharmacognosy, drug assaying, and research; a branch library; a drug service department; and a stockroom.

The University Hospital Pharmacy and the Student Health Center Pharmacy serve as clinical training facilities for the College. Senior students are assigned on a regular schedule to these pharmacies where they gain practical experience in compounding and dispensing prescriptions under the direction of staff pharmacists. The University Hospital Pharmacy and about ten other hospital pharmacies in Seattle serve as laboratories for the undergraduate and graduate programs in hospital pharmacy. The programs are directed by the Coordinator of Pharmaceutical Services, and laboratory instruction is given by the hospitals' chief pharmacists who hold the University rank of Clinical Instructors in Hospital Pharmacy.

The Drug Plant Gardens of the College comprise approximately three acres of garden area, including a laboratory building that contains five greenhouses; three research laboratories; drug drying, milling, and extraction equipment; a darkroom, and a preparation room. Several hundred species of pharmaceutically important plants are maintained in the gardens and greenhouses. One greenhouse is devoted to plants of tropical habitat; others are used for student instruction in methods of drug plant culture and for research in plant-growth regulators and the biosynthesis of plant constituents. An extensive seed exchange program is conducted with medicinal plant gardens throughout the entire world.

The drug service department manufactures specialized pharmaceutical preparations for the Schools of Medicine and Dentistry, the Student Health Service (Hall Health [fol. 168] Center), the University Hospital, and other sections of the University. Much of the work done by this department is in formulation and product development of drugs and dosage forms to be used in clinical and experimental research.

The College maintains a laboratory for the analysis of food products submitted by the Office of the Director of the State Department of Agriculture, drugs submitted by the State Pharmacy Board, and alcoholic products for the State Liquor Control Board. The Dean of the College is the State Chemist.

[fol. 169] 11. *The School of Social Work*

The School of Social Work was established in March, 1958, by the Board of Regents of the University of Washington. Prior to this date, instruction in social work was offered through the Graduate School of Social Work, a division of the Graduate School of the University.

Instruction in social work was first offered at the University in 1919 under the Department of Sociology. The Graduate Division of Social Work was established in 1934, and in 1939 it became the Graduate School of Social Work under the Graduate School. The School of Social Work was recognized as an independent professional school in 1958. It is fully accredited by the Accreditation Commission of the Council on Social Work Education.

The School of Social Work provides educational activities for: (1) an undergraduate curriculum in Social Welfare through affiliation with the Division of General Studies, College of Arts and Sciences; (2) a postbaccalaureate (graduate) professional curriculum preparing for positions of professional social work responsibility in public and private agencies; (3) a program of courses in the field of social welfare for graduate-level students in other units of the University; (4) a program of courses in the field of social welfare for students enrolled in the adult evening classes program; (5) a program of short courses, institutes, and workshops for professional practitioners who enroll in such postgraduate activities as the means to improve professional competence; (6) a program of courses, seminars, institutes, and workshops for staff members of social welfare agencies whose interests are allied to the professional practice of social work.

An on-going research program is conducted by members of the faculty and students.

The professional curriculum, one of the major program responsibilities for the School of Social Work, provides an educational experience which has been designed to prepare students:

[fol. 170] a. To help individuals, groups, or communities with what are to them unsatisfying social situations or with what are to society unsatisfactory social situations. These are social situations where:

(1) an individual, groups, or community is dissatisfied with his or its performance;

(2) an individual, group, or community violates explicitly stated requirements of society.

b. to expand the knowledge upon which social work practice is based.

c. To record and impart social work knowledge pertinent to social welfare.

[fol. 171] 12. *The School of Librarianship*

The University of Washington School of Librarianship was established in 1911 in response to the need for professionally trained librarians in the libraries of the Northwest.

The School was originally organized as an undergraduate department in the College of Liberal Arts. In the autumn of 1933 it became a part of the Graduate School and offered a one-year curriculum in librarianship leading to the degree of Bachelor of Arts in Librarianship. In 1952, following a major curriculum revision, the bachelor's degree was discontinued and a program leading to the degree of Master of Librarianship was inaugurated. The School of Librarianship is accredited by the Committee on Accreditation of the American Library Association and is a member of the Association of American Library Schools.

The School of Librarianship is in the south wing of the Henry Suzzallo Library Building. The book collection of the School contains the essential materials on librarianship, the William E. Henry collection of rare books, an outstanding collection of children's books, and a high school library collection. These materials are supplemented by the University Library with its numerous departmental and research libraries containing more than one million volumes. Students have access to the facilities of the Pacific Northwest Bibliographic Center and to the University's Film Center. The Seattle Public Library, the King County Public Library, and many school, college, and special libraries are available for observation and field work.

The basic program in librarianship is intended to prepare a selected group of college graduates for a professional career in library work. Programs are offered leading to the degrees of Master of Librarianship and Master of Law Librarianship. Undergraduate courses are also available to upper-division students who wish to qualify as teacher-librarians, to students in the College of Education who choose librarianship as a second area of concentration, and to students taking programs in other fields [fol. 172] who elect librarianship as a minor. An elective course in the Use of Books and Libraries is given each quarter as a service for the general University student.

The basic professional curriculum is organized around a group of studies designed to provide a sound foundation in the principles and methods of librarianship. These studies are required of all candidates for a degree in librarianship. In addition, the student elects courses which will prepare him for a special field of library service. Students who have a strong subject interest or who are preparing for special fields may elect up to 10 credits of graduate work in a subject field.

Each degree program comprises approximately 46 credits and normally requires four quarters for completion. The full program may be entered in either Autumn or Summer Quarter; a partial program may be started at the beginning of any quarter.

Librarianship is a nonthesis program, but a thesis is not precluded if a student wishes to engage in special investigation or research in a cognate field.

[fol. 173] 13. *The School of Law*

The School of Law was established at the University of Washington in 1899. It is presently housed in Condon Hall, named after John T. Condon, the organizer and first dean of the Law School. The building is designed and constructed for the particular needs of a law school.

The School is a member of the Association of American Law Schools and is approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association.

The objective of the faculty of the School of Law is to train young men and women for the practice of law anywhere in the United States, whether it be as advocate, counsellor, judge, or law teacher, in accordance with the highest traditions of professional responsibility. The study of law may also serve as the stepping-stone to a career in government, politics, or business. The curriculum and the methods of instruction are designed to develop in the student his highest potential, whatever may have been his reason for entering the school.

Since the problems of the individual litigant or client are at the same time a part of the larger problems of an enormously complex and competitive society, it is necessary in the training of effective practicing lawyers and judges to provide the widest possible perspective of history, economics, social sciences, and philosophy. It is essential that the student see and understand the law, not as a self-contained system designed primarily for the settlement of disputes between individuals, but as a decisive, if not the dominant, factor of social control in a society which is in constant flux. Thus the law is not, and cannot be, static. The man who is "learned in the law", as the old phrase put it, is still the one who has developed the ability to find sound solutions to new problems by developing and using, rather than merely echoing, the teachings of the past.

Methods of instruction vary with the instructor and the course. The basic materials are the actual decisions of ap- [fol. 174] pellate courts, supplemented by selected readings from other sources which shed light on the nature of judicial, administrative, and legislative processes. Classroom techniques encourage the student to rely upon his own initiative and to develop his powers of perception and communication.

The first two years of the curriculum are devoted to the study of basic courses and are required of all students. The third year is almost wholly elective, so that the student, in the light of his own developed interests, may delve more deeply into those subjects which he thinks will best suit his needs.

In the Winter Quarter of 1962, the School of Law established its program in the Law of Asian Countries. Supported by funds from the Ford Foundation, this program will place its initial research emphasis on the legal aspects of foreign investments, licensing, and trade, starting with Japan, and extending in due course to other Asian countries such as the Philippines, India, Malaya, and China.

Courses are offered on various aspects of the legal problems likely to be encountered in dealing with Asian affairs. The research and teaching programs are designed to develop materials not presently available to western legal scholarship and to meet the growing demand for lawyers and scholars trained in such matters.

The Law School Library contains over 144,000 volumes; included are decisions of all English and American courts of last resort and the reported decisions of all lower courts of the United States. Extensive collections of English, American, and colonial statutes are available, as are copies of all legal periodicals published in English.

In addition, the Law School Library has one of the best collections of Japanese law materials in the United States and other substantial Asian collections which are being augmented rapidly by use of new funds obtained from the Ford Foundation.

The School of Law is within a convenient distance of federal and state courts sitting in Seattle, and students can witness the trial of actual cases. The United States District Court is in session and tries cases almost continuously. [fol. 175] The United States Court of Appeals for the Ninth Circuit holds a session in the city each year. The superior court for King County, the justice courts, the municipal court, and the juvenile court are in session throughout the school year. The Supreme Court of the State of Washington, at Olympia, is also within comparatively easy reach and provides opportunities for students to hear the argument of cases on appeal.

[fol. 176] 14. *The School of Medicine*

The School of Medicine offers a four-year program of courses leading to the degree of Doctor of Medicine (M.D.),

programs leading to the Master of Science and Doctor of Philosophy degrees for students in the Graduate School, programs leading to Bachelor of Science degrees in Physical Therapy and in Occupational Therapy and Rehabilitation, and courses for practicing physicians. The four-year curriculum for an M.D. degree includes studies in three main areas: Basic Health Sciences, Conjoint Courses, and Clinical Sciences. In the Basic Health Sciences, the Departments of Anatomy, Biochemistry, Genetics, Microbiology, Pathology, Pharmacology, Physiology and Biophysics, and Public Health and Preventive Medicine offer courses for medical, dental, nursing, and pharmacy students, and for students in other University curricula. Conjoint Courses, sponsored jointly by various departments, are designed to integrate teaching in different medical fields. In the Clinical Sciences, the Departments of Anesthesiology, Medicine, Obstetrics and Gynecology, Pediatrics, Physical Medicine and Rehabilitation, Psychiatry, Radiology, and Surgery provide clinical study in the fields of medical specialization and in general medical practice.

The main purpose of the School of Medicine is to provide a solid foundation for the student's future development. The student must learn fundamental principles which are significant to the entire body of medical knowledge. He must, if he has not already done so, acquire habits of reasoning and critical judgment of evidence and experience in order that he may use the fundamental principles wisely in solving problems of health and disease. The educational program is also designed to inculcate on the student sound habits of self-education and the mastery of certain basic clinical and social skills. Every effort is made to develop sound attitudes regarding the people whom the student will serve and to instill a thorough understanding of professional and ethical principles. The four-year education program is planned to achieve these objectives.

The School of Medicine is approved by the Council on [fol. 177] Medical Education and Hospitals of the American Medical Association and by the Association of American Medical Colleges. It is a participating member of the Western Interstate Commission for Higher Education.

The School of Medicine through its departments and inter-departmental programs offers curricula leading to the degrees of Doctor of Medicine and Bachelor of Science in Physical Therapy and in Occupational Therapy, and graduate study leading to the degrees of Master of Science and Doctor of Philosophy in accordance with the requirements of the Graduate School.

Doctor of Medicine. Upon completion of the four-year curriculum of the School of Medicine, the M.D. degree is awarded to candidates who have (1) given evidence of good moral character; (2) completed the last two years of medical training as regularly matriculated students in the School of Medicine; (3) satisfactorily completed the required work throughout the course; (4) fulfilled all special requirements; and (5) discharged all indebtedness to the University.

Doctor of Medicine With Honor. Those students who meet the above requirements and whose work places them in the highest ten per cent of the graduating class receive a Doctor of Medicine with honor.

Bachelor of Science. A curriculum leading to a bachelor's degree with a major in public health and preventive medicine is offered for students in the College of Arts and Sciences. Professional courses in the curriculum are given by the Department of Public Health and Preventive Medicine in the School of Medicine. Public health students may choose an option in environmental health, biometry, or health education.

Bachelor of Science in Medical Technology. The medical technology program is designed to train young men and women to become technologists in hospital, clinic, and medical-research laboratories. The first part of the course consists of three years in the College of Arts and Sciences, with training in chemistry, zoology, physics, physiology, anatomy, histology, and microbiology. Upon successful completion of the three-year program, students may apply for admission to the final part of the course, which is offered by the Department of Pathology in the School of Medicine. [fol. 178] This eighteen-month period consists of both class instruction and practical supervised work in hospital and medical-research laboratories.

Bachelor of Science in Physical Therapy. A curriculum in physical therapy is offered by the Department of Physical Medicine and Rehabilitation in the School of Medicine. It provides professional training in the basic sciences and the clinical use of accepted physical therapy modalities and procedures.

Bachelor of Science in Occupational Therapy. A curriculum in occupational therapy is offered by the Department of Physical Medicine and Rehabilitation in the School of Medicine. It provides professional training in the basic sciences and the clinical use of occupational therapy.

Bachelor of Science in Basic Medical Science. The basic science degree may be taken at the end of the first year in the School of Medicine by students who have completed at least the third year of premedical training and the first year of the medical course at the University of Washington and have a grade-point average of at least 2.50 in college and the School of Medicine combined. Students who wish to qualify for this degree must complete University requirements for graduation as well as the requirements of the college and department in which the three years of premedical work were taken.

Master of Science and Doctor of Philosophy. Work leading to master degrees and Doctor of Philosophy degrees is offered, in accordance with the requirements of the Graduate School, in the Departments of Anatomy, Biochemistry, Microbiology, Pharmacology, Physiology and Biophysics. A master's degree program is offered by the Department of Surgery.

Internships of one-year duration in clinical medicine are available at the University Hospital, the King County Hospital, and the Children's Orthopedic Hospital. All clinical departments participate in the training program for interns in one or more of these institutions. Residency training programs are available in the clinical fields of anesthesiology, cardiology, general surgery, medicine, neurology, neurosurgery, obstetrics, gynecology, orthopedic surgery, pathology, pediatrics, physical medicine and rehabilitation, psy- [fol. 179] chiatry, radiology, and urology. The residency programs vary in duration from two to five years and are

integrated, providing for rotation through several of the University affiliated hospitals during this period of training.

Postdoctoral fellowships and traineeships are available in all basic health sciences and clinical departments. They are designed to provide further research and teaching experience for the advanced student who has already obtained his Ph.D. or M.D. degree.

The School of Medicine functions as a center for continuing medical education for physicians in the region. A series of short courses (in general extending from one day to one week) designed primarily for the general physician is offered at various times throughout the year. The clinical faculty, with the assistance of basic science investigators, plans and gives courses which provide the practicing physician with an opportunity to review fundamental concepts and to go into recent advances in diagnosis and treatment in some depth in specialized fields, such as cardiology, electrolyte and fluid balance, gastroenterology, hematology, infectious diseases, neurology, metabolism, allergy, practical psychiatry, emotional problems in children, gynecologic and obstetric endocrinology, and so forth.

The School cooperates with the Washington State Department of Health and other governmental agencies, physicians' organization, and voluntary organizations in developing refresher courses in cancer, diseases of the heart, diabetes, alcoholism, safety, and so forth.

Physicians are always welcome to participate in the regular rounds and conferences scheduled in the University Hospital and clinics and the hospitals affiliated with the University in the teaching program. Physicians are also urged to attend the conjoint clinical conferences held each Saturday morning for students and staff.

Refresher courses are extended to other health professions such as medical technologists, physical therapists, and occupational therapists.

[fol. 180] 15. *The School of Dentistry*

The School of Dentistry offers a four-year program of courses leading to the degree of Doctor of Dental Surgery

(D.D.S.); programs leading to the Master of Science in Dentistry for students in the Graduate School; and courses for practicing dentists. The four-year curriculum for the D.D.S. degree includes study in two main areas: Basic Sciences and Clinical Dental Sciences. Instruction in the basic sciences is provided by the Departments of Anatomy, Biochemistry, Microbiology, Pathology, Physiology and Biophysics, Pharmacology, and Public Health and Preventive Medicine of the Health Sciences Division. In the clinical dental sciences the Departments of Dental Science and Literature, Dental Materials, Fixed Partial Dentures, Operative Dentistry, Oral Diagnosis and Treatment Planning, Oral Pathology, Oral Surgery, Orthodontics, Pedodontics, Periodontics, Endodontics, and Prosthodontics provide instruction in the fields of general dental practice and dental specialization.

The objective of the School of Dentistry is to provide a foundation for the student's future development. The program of instruction is designed to provide the student with the opportunity to learn fundamental principles which are significant to the entire body of dental knowledge. It is expected that the student will acquire habits of reasoning and critical judgment in order that he may use the fundamental principles wisely in solving problems of dental health and disease. The Dental School expects its students to learn the fundamentals of the basic health sciences, to master certain clinical skills and to acquire a thorough understanding of professional and ethical principles. The four-year educational program is planned to achieve these objectives.

The School of Dentistry is approved by the Council on Dental Education of the American Dental Association and is a member of the American Association of Dental Schools. It is a participating member of the Western Interstate Commission for Higher Education.

The Department of Dental Hygiene is an integral part [fol. 181] of the School of Dentistry with the same basic objectives and offers courses of instruction leading to a Bachelor of Science degree with a major in Dental Hygiene or Public Health Dental Hygiene.

The School of Dentistry offers courses leading to the degrees of Doctor of Dental Surgery (D.D.S.), Bachelor

of Science, Bachelor of Science in Basic Medical Science, Master of Science in Dentistry, as well as Certificates in orthodontics, pedodontics, or restorative dentistry.

Doctor of Dental Surgery. Upon completion of the four-year curriculum of the School of Dentistry, the D.D.S. degree is awarded to condidates who have (1) given evidence of good moral character; (2) completed the last two years of dental training as regularly matriculated students in the School of Dentistry; (3) satisfactorily completed all the required work with a grade-point average of at least 2.00; (4) fulfilled all special requirements; and (5) discharged all indebtedness to the University.

Work leading to the following degrees is also offered in the School of Dentistry.

Bachelor of Science. The curriculum leading to this degree is given by the Department of Dental Hygiene.

Bachelor of Science in Basic Medical Science. This degree may be taken at the end of the first year in the School of Dentistry by students who have completed at least the third year of predental training and the first year of the dental course at the University of Washington and have a grade-point average of at least 2.50 in college and Dental School combined. Students who wish to qualify for this degree must have completed University requirements for graduation as well as the requirements of the college and department in which the three years of predental work were taken.

Master of Science in Dentistry. Work leading to this degree is available through the Graduate School.

Certificate in Orthodontics, Pedodontics, or Restorative Dentistry. Programs are not administered by the Graduate School; no thesis is required.

[fol. 182] 2. With the exceptions of plaintiffs who have been dismissed from this cause, Rocky Bauer, Jay Patrick Donaly, Roberta Milowe and Wayne C. Muller and who are contracting students paying tuition to the University of Washington, all remaining plaintiffs, at all times material to this cause, are employees, in various capacities, and perform duties pursuant to their contracts of employment with the State of Washington being hired and em-

ployed by the University of Washington. The plaintiffs so employed are listed below, and those having tenure are so specified:

1. Lawrence W. Baggett, employed as a teaching assistant in mathematics and is a registered graduate student. His employment began June 16, 1961.

2. Z. W. Birnbaum, employed as a professor and director of mathematics, with tenure. His employment began in September of 1939, and he acquired tenure October 1, 1945.

3. Joost A. Businger, employed as an associate professor of meteorology and climatology, with tenure. His employment began September 16, 1958.

4. Isabel S. Caro, employed as an assistant professor of anthropology. Her employment began August 1, 1960.

5. Giovanni Costigan, employed as a professor of history, with tenure. His employment began in 1934, and he acquired tenure May 1, 1942.

6. G. Dash, employed as an associate professor of physics, with tenure. His employment began August 16, 1960, and he acquired tenure in 1961.

7. William A. Dawson, employed as a research instructor in Oceanography. His employment began March 1, 1960.

8. David M. Eaves, employed as a teaching assistant in mathematics. His employment began September 16, 1961.

9. John M. Emlen, employed as a teaching assistant in zoology. His employment began September 16, 1961.

10. T. Saunders English, employed as an assistant professor in Oceanography. His employment began September 16, 1959.

[fol. 183] 11. Victor Erlich, employed as a professor of Slavic languages and literature, with tenure. His employment began September 16, 1948, and he acquired tenure in 1952.

12. Robert G. Fleagle, employed as a professor of meteorology and climatology, with tenure. His employment began September 16, 1948, and he acquired tenure September 16, 1951.

13. Ronald Geballe, employed as a professor of physics, with tenure. He is the executive officer of the Physics department. He was hired August 26, 1943, and he acquired tenure September 16, 1954.

14. Patrick D. Goldsworthy, employed as a research assistant professor and lecturer in bio-chemistry of medicine. His employment began September 1, 1952.

15. Milton P. Gordon, employed as an assistant professor of biochemistry. He was hired June 1, 1959.

16. Alvin D. Greenberg, employed as a teaching assistant in English and is a registered graduate student. His employment began September 16, 1961.

17. Robert E. Greengo, employed as an assistant professor of anthropology. His employment began June 1, 1957.

18. Gordon Griffiths, employed as an associate professor of history, with tenure. His tenure began with the date of his employment on August 16, 1959.

19. W. Mary Griffiths, employed as an acting assistant professor of zoology. Her employment began September 16, 1959.

20. Isaac Halpern, employed as a professor of physics, with tenure. His employment began on August 16, 1953, and he acquired tenure in 1956.

21. Arnold Hanson, employed as a micrometeorologist. His employment began April 1, 1959.

22. W. Stull Holt, employed as a professor of history, with tenure. His tenure began with his employment on September 1, 1940.

23. Abraham C. Keller, employed as an associate professor of romance languages, with tenure. His employment

began on August 16, 1948, and he acquired tenure on [fo]. 184] September 16, 1952.

24. Arthur L. Kobler, employed as a research associate professor part-time of electrical engineering. His employment began on July 1, 1961.

25. Scott Lytle, employed as an associate professor of history, with tenure. His employment began on August 16, 1949, and he acquired tenure in 1954.

26. Robert W. Macdonald, employed as an assistant professor of social work. His employment began on October 1, 1957.

27. D. F. Magee, employed as an associate professor of pharmacology, with tenure. His employment began on December 15, 1951, and he acquired tenure in 1957.

28. Henry W. Maier, employed as an associate professor of social work, with tenure. His employment began on August 16, 1959, and he acquired tenure in 1960.

29. William H. Matchett, employed as an associate professor of English, with tenure. He was hired on September 16, 1954, and he acquired tenure in 1960.

30. Karl P. Mauzey, employed as a research assistant in zoology. He was hired on September 16, 1960.

31. Trevor J. McMinn, employed as an assistant professor of mathematics. His employment began September 16, 1956.

32. Irving Milowe, employed as a clinical instructor in psychiatry in the medical school. His employment began August 1, 1961.

33. Rhoads Murphey, employed as an associate professor of geography, with tenure. His employment began August 15, 1952, and he acquired tenure on September 16, 1956.

34. David S. Newman, employed as an instructor in mathematics. His employment began on September 16, 1961.

35. Howard Nostrand, employed as a professor of Romance languages and literature, with tenure. He is the executive officer of the Romance Language and literature department. His employment began September 1939, and he acquired tenure at that time.

[fol. 185] 36. Gordon H. Orians, employed as an assistant professor of zoology. His employment began September 1, 1960.

37. Simon Ottenberg, employed as an associate professor of anthropology, with tenure. His employment began September 16, 1955, and he acquired tenure in 1961.

38. Jack R. Parsons, employed as an associate professor of social work, with tenure. His employment began September 16, 1955, and he acquired tenure in 1957.

39. Eugene C. Pizzuto, employed as an assistant professor of art, with tenure. His employment began September 16, 1957.

40. Melvin Rader, employed as a professor of philosophy, with tenure. His employment began in 1930, and he acquired tenure in 1944.

41. Kenneth Eyre Read, employed as an associate professor of anthropology, with tenure. He is the executive officer of the Anthropology department. He was hired November 16, 1956 and he acquired tenure September 16, 1958.

42. Max Savelle, employed as a professor of history, with tenure. He acquired tenure at the beginning of his employment September 16, 1947.

43. Annick Smith, employed as an assistant editor of the University of Washington press. Her employment began September 25, 1961.

44. C. A. Valentine, employed as a visiting assistant professor of anthropology. His employment began September 16, 1961.

45. Leslie Warner, employed as a secretary-typist by the University of Washington. Her employment began March 7, 1962.

46. James B. Watson, employed as a professor of anthropology, with tenure. His employment began August 1, 1955, at which time he acquired tenure.

47. Walter B. Watson, employed as an assistant professor of sociology. His employment began September 16, 1958.

48. Philip E. Wilcox, employed as an associate professor of biochemistry, with tenure. His employment began July 1, 1952 and he acquired tenure in 1957.

[fol. 186] 49. Theodore W. Wilcox, employed as a research assistant in the Research Computer Laboratory. His employment began September 16, 1960.

50. William B. Woolf, employed as an assistant professor in the mathematics department. His employment began August 16, 1959.

51. Paul Dietrichson, employed as an associate professor in philosophy. His employment began August 16, 1955 and he acquired tenure in 1961.

52. Jon Bridgman, employed as an assistant professor in history. His employment began August 16, 1961.

53. Boris A. Jacobsohn, employed as a professor in physics with tenure. His employment began in September 16, 1948 and he acquired tenure on August 16, 1955.

54. Patricia J. Keller, research assistant professor in biochemistry. Her employment began September 1, 1955.

55. Lucille L. Curtis, employed as a secretary-typist in the department of history. Her employment began August 1, 1961.

56. Albert Nujenhuis, employed as a professor of mathematics with tenure. His employment began November 16, 1956 and he acquired tenure in 1962.

57. Richard Morrill, employed as an assistant professor in geography. His employment began September 16, 1958.

58. Willis Konick, employed as a full-time instructor in the Far Eastern department (Russian section). His employment began September 16, 1959.

59. Robert G. Clarke, employed as a detailer one-half time at the cyclotron department. His employment began February 1, 1962.

60. Theodore Lane, employed as a teaching assistant in the economics department. His employment began September 16, 1961.

3. The following plaintiffs are aliens:

1. Joost E. Businger, a citizen of Holland, and professor of mathematics, with tenure. He has filed a petition to become a citizen of the United States.

[fol. 187] 2. Kenneth Eyre Read, a citizen of Australia, associate professor of anthropology, with tenure, and executive officer of the anthropology department.

3. Paul Dietrichson, a citizen of Norway, and associate professor of philosophy, with tenure.

4. All remaining plaintiffs except those named in the paragraph immediately above are citizens of the United States of America.

5. The defendants at all times material to this cause are as follows:

1. Charles E. Odegaard, duly appointed and acting President of the University of Washington.

2. The duly appointed and acting members of the Board of Regents of the University of Washington:

(1) Dorothy Builitt (President)

(2) Albert Murphy

(3) Joseph Drumheller

(4) John L. King

(5) Herbert S. Little

(6) Robert J. Willis

(7) Harold S. Shefelman

3. John J. O'Connell, duly elected and acting Attorney General of the State of Washington, having the duty of en-

forcing and interpreting, on behalf of the State of Washington, the statutes of the State of Washington. He is the legal advisor of the defendant regents and of the University of Washington.

6. As reproduced below and as set forth in Chapter 97, Subchapter I, Laws of 1909 of the State of Washington, the immediate government of the University of Washington has been vested in its faculty under such rules prescribed by the Board of Regents:

> "The faculty of the University of Washington shall consist of the president and the professors, and said faculty shall have charge of the immediate government of the institution under such rules as may be prescribed by the board of regents."

[fol. 188] 7. As reproduced below and as set forth in Chapter 176, Laws of 1939 of the State of Washington, the ultimate governing power over the University of Washington has been vested by the legislature of the State of Washington in the Board of Regents:

> "The Board of Regents may adopt by-laws or rules and regulations for its own government. The powers and duties of the Board of Regents are as follows:
>
> "first. The said board shall have full control of the university and its property of various kinds, and shall employ the president, members of the faculty, assistants and employees of the institution, who shall hold their positions during the pleasure of said Board of Regents."

8. The defendant Charles E. Odegaard upon the direction of the defendant regents, and subject to such regulations and delegations of powers as the regents have promulgated, employs and discharges from employment, on behalf of the State of Washington, all persons employed at the University of Washington, except those who are officers of the university whose appointments, promotions, demotions and dismissals are recommended to the Board of Regents for action.

9. One statute, hereinafter called the "1931 oath" and the constitutionality of which is in issue here, is found in Chapter 103, Laws of 1931, of the State of Washington hereafter set forth. It requires an oath of allegiance from all teachers. It does not apply to all state employees.

> RCW 28.70.150. "Oath of allegiance required. Every person applying for a certificate to teach or making a contract to teach in the state shall take and subscribe to the following oath or affirmation:
>
> "I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order and undivided allegiance to the government of the United States."
>
> "Any certificate or contract to teach in the state shall be void unless it affirmatively appears on the application for the certificate or in the contract, that the teacher has taken, subscribed, and filed therewith the foregoing oath or affirmation."

An issue in this case is whether this statute violates the Constitution of the United States of America.

10. For many years, the past practice at the University of Washington with regard to citizens of the United States of America and at all times material to this cause, has been that of requiring and obtaining the 1931 oath from all its [fol. 189] non-alien teaching personnel, except during the past seven years because the injunction granted in Nostrand v. Little, *infra*, was in force. When this injunction was dissolved, then pursuant to statute a demand was made by President Odegaard on May 28, 1962, that the oath form A here in question be executed.

For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and at all times material to this cause, has been similar to

that suggested by the memorandum circulated through the department of Mathematics and reproduced below:

Department of Mathematics

June 1, 1962

Members of the Faculty and
Graduate Students

Subject: Modification of Loyalty Oath for Non-Citizens

Word has been received from the President's Office that non-citizens of the United States will be asked to sign a modified form of the loyalty oath which was distributed to you a few days ago.

The last clause of the first sentence which reads "and undivided allegiance to the government of the United States" may be replaced by the phrase "insofar as it is compatible with my citizenship in ————————."

I trust that this will alleviate worries on the part of those of you who could not have signed the oath in its original form.

Yours sincerely,

/s/ Carl B. Allendoerfer
Carl B. Allendoerfer

CBA:be

The 1931 oath has been expressly enacted in approved statutory language by the legislature of the State of Washington. Alien members of the teaching faculty have not been asked to subscribe to the oath during the past seven years because the injunction granted in Nostrand v. Little, [fol. 190] *infra*, was in force. When this injunction was dissolved, then pursuant to statute, a demand was made by President Odegaard, on May 28, 1962, that all members of the teaching staff, including aliens, execute the oath form A here in question.

11. In order to promote its educational purposes, the University of Washington has undertaken to act as the

sponsor for aliens of high academic merit who have been selected to fill faculty positions, temporary or permanent, and who must, therefore, immigrate to the United States, obtain a visa and be in residence on or about the campus during the tenure of their appointment at the University of Washington.

12. The other statutes material to this cause and whose constitutionality are contested here require that as a condition of employment, all state employees take a "loyalty oath", i.e., they must file a disclaimer. These statutes are hereinafter referred to as requiring the "1955 oath" and are part of the Subversives Activities Act of the State of Washington being Chapter 377, Laws of 1955, amending Chapter 254, Laws of 1951. The relevant portions questioned here are set out below:

Subversive Person Ineligible for Public Employment.

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any country, municipality, or other political subdivision of this state." (RCW 9.81.060).

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010(5)).

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010(2)).

[fol. 191] "'Foreign subversive organization' means any organization directed, dominated, or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010(3)).

Communist Party Declared to Be Subversive Organization.

"The Communist party is a subversive organization within the purview of Chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083).

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and

refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070).

13. The Subversive Activities Act statutes set out in the paragraph immediately above do not describe an oath or disclaimer in statutory terms. The Attorney General's office has the duty, and has prepared, at least two oath forms under that statute. One was presented to the faculty in 1955, and the other in 1962.

14. Two separate oaths are by state law required of the teaching faculty of the University of Washington. They are the 1931 oath of allegiance and the 1955 loyalty or disclaimer oath, and are found on Oath Form A.

15. Only one oath, the 1955 oath, is required of non-teaching faculty of the University of Washington. It is found on Oath Form B.

16. For purposes of taking the oaths which are in question here, the "teaching faculty" of the University of Washington is properly defined by the second paragraph of a memorandum of June 4, 1962, from Provost of the University, F. P. Thieme, directing University Deans, Directors and Chairmen of departments to begin administering the oaths to University personnel and which is totally here incorporated into this order and is reproduced herein as follows:

[fol. 192] Memorandum to Deans, Directors, and Chairmen

Subject: Statutory Statement and Oath for Faculty and Staff

You have already received a statement of May 28 indicating that the University of Washington is now under legal obligation once again to ask that oaths be signed. I am now writing to expand the initial statement with respect to the process to be followed in obtaining the signatures. The May 28 statement con-

tained a description of the background leading up to the present statutory requirement that we again ask teaching faculty and all other personnel on the staff to sign a statement and oath and gave the form to be used. Copies of the two statements and oaths, Form A for the teaching faculty and Form B for all other members of the staff, are attached.

To enable the University to carry out these responsibilities, you are asked to request all persons having teaching responsibility, who have not previously signed the appropriate oath, to sign Oath Form A. For the purposes of this statement and oath, teaching faculty is interpreted as including all teaching fellows, pre-doctoral associates, lecturers, instructors, and the professorial ranks. If research appointees holding professorial titles actually engage in any kind of teaching, as determined by the academic officer who is responsible for the assignment of their duties, they should be asked to sign Oath Form A. If they do not have teaching responsibilities, then they must be asked to sign Form B. Whether the person is paid from general University funds or contract and grant funds administered by the University is irrelevant.

Oath Form B should be signed by all other members of the University staff, whether paid on full-time, part-time, or hourly basis and whether they are a student or not. Again, any person who has previously signed the appropriate statement and oath need not repeat it.

It is evident that the task of obtaining all of these notarized signatures will be protracted and time consuming. Therefore, I am sending to you in this mail a supply of Oath Form A and B with the suggestion that those who wish to complete the form prior to the October 1, 1962 deadline be encouraged to do so since it will reduce the costs of administration in meeting statutory requirements if as many persons as possible will complete the form in the course of the summer and thus reduce the "crash" clerical operation which would otherwise have to be faced near October 1, 1962.

As October 1 approaches, it will be necessary to check the forms received against the total list of appointments or payroll records. For this reason each director or chairman is asked to take whatever means he wishes to devise and keep a record of those under his administrative supervision who have signed the new forms. My office will soon prepare a list of persons in your unit who have already signed and thus need not submit a new Oath Form A or B. Thus by October 1 each of you should know whether the entire staff under your supervision will have signed the oath and thus be eligible for continuation on the payroll after that date.

In order to make the task as easy as possible, the following employees on the campus will serve to notarize signatures during regular office hours:

[fol. 193]

Name	*Department*
Miss Betty Gahringer	Registrar's Office
Professor W. M. Read	University Press
Mrs. Sally Hall	Hospital
Mr. James Reilly	Applied Physics Laboratory
Miss Grace Uyeda	Health Sciences Business Office
Mr. Harry W. Seymour	Registrar's Office
Mr. G. L. Goodson	Hospital
Miss Louise B. Carroll	Engineering
Mrs. Aline Foster	Cashier's Office
Mrs. Betty Thumlert	Payroll

If other names are added, you will be informed of them.

Your attention is also called to the need for informing appointees who are to be on duty October 1, but who have not yet reported on the campus hat they must sign the oath. These persons, as well as prospective faculty appointees and employees should be sent a copy of the oaths, *and of the explanatory statement of May 28, 1962.* Signed forms from these persons must be in our hands by October 1, 1962, or at the time of their employment if subsequent to that date.

If you have any questions regarding procedures to be followed, please address your inquiry to your dean or division head. If additional copies of the forms and of the statement of May 28 are needed, they can be obtained by calling the Payroll Office, Extension 2668.

/s/ F. P. Thieme
F. P. Thieme
Provost

17. The required 1955 oath and its supporting statutes have been the subject of prior litigation.

Sometime before August 29, 1955, all employees of the University of Washington were asked to sign an oath fulfilling the requirement of the 1955 statute and all teaching faculty were asked to sign both the 1931 and an oath then drafted to meet the 1955 statute.

On August 29, 1955, two professors, with tenure, Howard L. Nostrand and Max Savelle, as individuals and not as representatives of a class, filed a complaint in the Superior Court of the State of Washington for Thurston County (No. 28814). This complaint, attacking the 1955 oath, sought injunctive relief and a judgment declaring unconstitutional Chapter 377, Laws of 1955, amending Chapter 254 Laws of 1951 (RCW 9.81). The complaint did not attack the 1931 oath. The oath form presented to the faculty contained not only the statutory wording required by the 1931 oath, but also a second paragraph designed to meet [fol. 194] the requirements of the 1955 Act. Appended to the complaint in that action as Appendix "A" and reproduced immediately below is a copy of the oath form then used by the University of Washington and then presented to the University teaching faculty:

Oath As Presented to Professors Nostrand and Savelle Prior to Action of Nostrand vs. Little

"STATE OF WASHINGTON
OATH FOR ADMINISTRATIVE RESEARCH, AND
FACULTY PERSONNEL OF THE UNIVERSITY
OF WASHINGTON

Department, office or other agency (Print or type) | Title or Position (Print or Type)

State of .....
County of .....

ss. AFFIDAVIT

I, the undersigned, do solemnly swear (or affirm):

(1) That I will support the constitution and laws of the United States of America and the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them by revolution, force or violence;

That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....
(Signature)

Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 1955, at .....
(City or Place) — (State)

Notary Public in and for the State ....., residing at .....

(To be executed in duplicate, one copy to be retained by individual.)"

The Superior Court for the State of Washington, Thurston County, entered its final decree in the cause on April 29, 1957, which provided:

[fol. 195] "It is Hereby Ordered, Adjudged and Decreed that Chapter 377, Laws of 1955 violates the Constitution of the State of Washington, and is therefore void and no effect;"

That court enjoined the entirety of Chapter 377, Laws of 1955.

On January 29, 1959, the Supreme Court of the State of Washington, in cause No. 34451, modified the decree of the Superior Court for the State of Washington, Thurston County. The Supreme Court held that Section 3 of Chapter 377, Laws of 1955 (RCW 9.81.082) was severable and unconstitutional and that defendants be perpetually enjoined from enforcing that section which is and has been the situation, during all times material to this cause. That section provides:

"for the purpose of the act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive order No. 9835."

The Supreme Court of the State of Washington upheld, over all attack, the constitutionality of the 1955 oath and its supporting statutes.

On appeal of the decision of the State Supreme Court described immediately above to the United States Supreme Court in cause No. 342, October term, 1959, resulted in a *per curiam* decision; with two dissents, which vacated the decision of the State Supreme Court for the State of Washington and remanded the case to that court for a determination whether the statutes supporting the 1955 oath afforded employees of the State of Washington a hearing "at which the employee can explain or defend his refusal to take the oath" (362 U.S. 474).

On the remand to the Supreme Court of the State of Washington that court held that the statutes requiring the 1955 oath did not afford plaintiffs such a hearing, but that such a hearing was provided plaintiffs who, having tenure, were entitled to a hearing because of their peculiar university status:

> "We conclude that the professors are not entitled to a hearing under Section 15 of the 1951 Act, but, as stated above are entitled to a hearing before the tenure committee, because the rules and regulations adopted by the regents (which form a part of their contracts of employment) so provide."

[fol. 196] The decision of the Supreme Court for the State of Washington described immediately above was appealed to the United States Supreme Court and that Court, with two dissents, granted a motion to dismiss in a *per curiam* decision which is herein reproduced: "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question." The date of this decision was January 22, 1962.

No final determination by the United States Supreme Court of the constitutionality of the 1955 oath or its supporting statutes has ever been rendered.

18. On May 28, 1962, upon advice from the defendant O'Connell, the defendant Odegaard, acting at the direction of the defendant regents, has demanded that all employees of the University of Washington sign an oath form which would fulfill the requirements of the Washington Subversive Activities Act. This oath can be found

on both Oath Form A and Oath Form B. It is designed to satisfy the 1955 statute, and not the 1931 statute, and is different from that presented to Professors Nostrand and Savelle which led to the litigation described above. The demand of President Odegaard was set forth in a notice distributed to all employees of the University, dated May 28, 1962, a copy of which has been attached as Exhibit B to plaintiffs complaint and reproduced in paragraph twenty below, and is incorporated throughout this order.

That notice demanded that all teaching faculty of the University of Washington execute a different oath form designed to fulfill the requirements of both the 1931 and 1955 statute; the oath form is denominated "A".

Copies of Oath Forms "A" and "B" are attached to this order and are incorporated throughout.

19. Execution of the required oaths on Forms A and B described in the paragraph immediately above is made by statute and action of the defendant regents, a condition precedent to any and all employment at the University of Washington. No employee at the University nor any plaintiff in this cause is afforded a hearing by any statute described in Paragraph 17 above, standing alone.

[fol. 197] *20.* On the 28th day of May, 1962, there was distributed from the office of the President, Charles E. Odegaard, a memorandum to all members of the staff of the University of Washington reading as follows:

> To All Members of the University Staff:
>
> At its meeting on May 25, 1962, the President reported to the Board of Regents that the University had been advised by the Office of the Attorney General of the state of Washington that pursuant to the decision of the Supreme Court of the United States there has now been dissolved the restraining order which had the effect of suspending the requirements as provided by state law that all employees sign the loyalty oath and that the teaching faculty sign, in addition, the oath to support the constitution.
>
> Like every other board, commission, council, department, court or other agency of the state of Washing-

ton, the Board of Regents is required by state law to use procedures designed to ascertain whether a person employed by it is a subversive person and to require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization. The Office of the Attorney General has provided an approved form of statement and oath.

In the case of teaching faculty the oath contains two sections, the first being the oath to support the constitution and the second being the loyalty oath. The text is as follows:

"I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"I further certify that I have read the provision of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; and I swear (or affirm) that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury."

In the case of staff other than teaching faculty, only the second or loyalty oath is required.

The oath to support the constitution has been in effect since 1931 and has not been an object of litigation. The "Loyalty" oath was first added in legislation dated from 1955 and has been the object of litigation leading to the deletion of a portion of the law

which was declared unconstitutional. Mr. Harlocker, Assistant Attorney General, reports that the statute as upheld now by the courts, in essence requires a person to state that he is not a subversive person or knowingly a member of a subversive organization, that is, a person or organization which commits, advocates, abets, advises, or teaches by any means any act intended to overthrow, destroy, or alter the constitutional form of the government of the United States or the state of Washington by revolution, force, or violence, the Communist party being declared to be a subversive organization and membership in it being declared to be subversive.

Attention, however, is directed to the full wording of the appropriate provisions of the law which will appear on the reverse of the statement and oath and which are the following:

[fol. 198] Subversive Person Ineligible for Public Employment.

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060).

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises, or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as de-

scribed in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5)).

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010(2)).

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3)).

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083).

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require

every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070).

The law provides that "refusal to answer on any grounds shall be cause for immediate termination" of employment. To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, a check of the personnel records of the University is in process so that those persons who have not previously sworn to the required oaths may be requested to do so. These requests will be submitted as soon [fol. 199] as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, compliance will be requested by October 1, 1962, with notification that in the event of failure to comply, employment will be terminated 30 days later as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign.

In approving this schedule for actions required in order to comply with the law, the Board of Regents adopted the following statement:

"If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination of employment, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with provisions of Washington state law which is binding upon the Board of Regents.

"Attention should be directed to Section 2511 of the Faculty Code and to the italicized portion thereof:

"'The University of Washington Regents accept in principle the concept that tenure for members of the

faculty is essential for effective teaching and sustained productivity in scholarship.

"'They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, *maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the state of Washington.*'

"In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs on tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the state of Washington, and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath."

21. At all times material to this cause, plaintiffs, and others similarly situated, have refused to execute the oath forms demanded of them and continue to do so.

22. Plaintiffs, and others similarly situated, have no speedy or adequate remedy at law.

23. Unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oath, plaintiffs, and others similarly situated, will suffer irreparable injury not compensable in monetary damages.

24. Each of the plaintiffs is a member of a class so numerous as to make it impracticable to bring them all before [fol. 200] the court. The character of the rights sought to be enforced for the various classes is several, but there are common questions of law and fact affecting the several rights here concerned and common relief is sought. This cause is a proper class action.

25. This action is brought for declaratory relief pursuant to Section 2201 of Title 28 of the United States Code and to obtain an interlocutory and permanent injunction of the statutes of the State of Washington reproduced and described in paragraphs 10 and 12 above, pursuant to the provisions of Chapter 155 of Title 28 of the United States Code.

26. All plaintiffs are willing and able to testify that, in their opinion and in accordance with the facts of their knowledge, they have not and do not use their positions of employment at the University of Washington in any such ways as knowingly to bring about the violent overthrow, by force, of the governments of either the United States of America or the State of Washington.

27. The Faculty Handbook, Parts I, II, and IV, Chapter 24 at pages 47 through 54, and the memorandum to the Deans of the University of Washington from President Charles E. Odegaard dated February 6, 1959, copies of which are attached to this order and incorporated throughout, at all times relevant to this cause, govern the procedures relating to appointment and promotion of faculty members at the University of Washington.

28. Professor Georg Wust, a subject of Germany, and one of the world's leading authorities on dynamical oceanography, was a Walker-Ames visiting professor to the University of Washington during the Spring of 1962. During the summer of 1962, one of the foremost learned figures in the field of the physiology of marine phytoplankton, Professor Steemann Nielsen, a Danish subject, taught a course at Friday Harbor, the University of Washington's marine station.

29. Meteorology is a thoroughly international science, a part of which studies Atmospheric Turbulence. Soviet scientists have made significant contributions to the understanding of atmospheric turbulence. The similarity theory developed by the Soviet scientist, Kolmogoroff, in 1940 [fol. 201] remains the basic theory guiding much of the scientific work currently being done in atmospheric turbulence.

30. Plaintiffs Birnbaum, English, Goldsworthy, Geballe, Holt, Jacobsohn, Nostrand, Read, Rader, Savelle and Philip E. Wilcox earn a salary from the State of Washington, as a consequence of their employment by the University of Washington, in excess of $10,000 per year. Many other plaintiffs, and others similarly situated, earn in excess of $10,000 per year as a consequence of their employment by the University of Washington.

[fol. 202] *Facts Not to Be Contested*

Plaintiffs and defendants agree that each and every following statement, appearing in this section, Facts Not To Be Contested, shall be admitted into evidence without objection thereto, and it expressly has been agreed by plaintiffs and defendants that they hereby, and do, waive any and all objections to the admission of this section into evidence with the sole exception that counsel for defendants expressly reserves the right to object to the admission of portions of paragraph 45, printed below, on the grounds that they constitute inadmissible hearsay, all further objections being waived. It being further agreed by plaintiffs and defendants that neither of them concede the probative value of any of the statements produced below, nor the weight that the Court properly should ascribe to them in resolving any of the issues in this cause.

Plaintiffs do not intend to contest the following facts, introduced by defendants, at trial by evidence to the contrary:

[fol. 203] *31.* If Charles D. Odegaard, defendant, were called upon to testify he would do so as follows:

1. That the memorandum of May 28, 1962, distributed to all members of the University staff, was an actual demand made upon all employees of University of Washington that they execute either Oath forms A or B, whichever might be applicable to them.

2. That, as President of the University, he made this demand upon all employees pursuant to statute and upon advice from the Attorney General of the State of Washington and at the direction of the Board of Regents of the University of Washington.

3. That he is of the opinion that this course of action was, and is, necessary and required by the statutes in question in this case.

4. That the October 1, 1962, deadline date was made solely to accommodate the necessary administrative procedures required to carry out the mandate of the statutes and that he fully expected and insisted, until restrained by judicial action in this case, that all employees sign the proper oath form prior to that date. The removal of the previous injunction in *Nostrand* v. *Little, supra,* presented the University of Washington with a difficult administrative problem as it tried to set up clear-cut procedures to meet the statutory requirement that all teachers sign oath form A and all other employees sign oath form B. To indicate, partially, the size of the task involved in administering these procedures, it must be pointed out that over 13,000 persons are employed full or part-time by the University. Included in this total are many students employed on a part-time basis; nearly 3,300 persons are paid primarily from grant and contract funds; there are over 430 clinical staff appointees, eighty per cent of whom contribute, in some degree, to teaching and research activities; a number of faculty and staff on the payroll who are currently serving outside in the state or, in some instances, beyond the national boundaries but who are subject to the statutes, and there are many other persons who because of the nature of their duties are not easily classifiable as to the form of oath they must sign.

[fol. 204] This latter question, for instance, arises in the case of the Applied Physics Laboratory, which is administered by the University but supported in its entire operation by the U. S. Navy Bureau of Weapons and employs nearly one hundred security-cleared persons. The same question of proper classification applies to the over three hundred research assistants and the ninety odd research professional appointees and other supporting personnel who are paid from grant and contract funds. The most significantly complicating element in this classification of personnel, however, is not only its numbers but the fact that many persons in it have, from time to time, responsibilities for

instruction. Whatever the final disposition of matters to satisfy the legal requirements, it is clear that the procedures to be followed in the administration of the oaths are not only complex and time consuming but involved with knotty questions of definition and classification, all of which increase the burdens of administering the oath. This is why the October 1, 1962, deadline date was set. In order to carry out these procedures, to avoid administrative overload, and to obtain the executed oaths by October 1, 1962, it was necessary that the subordinate department heads begin immediately after May 28, 1962, to begin administering the oath forms to the employees under their jurisdiction.

A special complicating element has been added with the institution on June 6, 1962, of judicial proceedings which question the validity of the statutes requiring the oath. Since June 7, and until the temporary restraining order was issued, the University has been deluged with queries as to whether the oath need now be signed. It is being asked, for example, whether prospective employees who are due to report next fall are obliged to sign and if so what will be their obligation at that time. And there are other basic questions. Some of these center on the fact that the regular teaching faculty is made up of over 1,400 individuals of whom approximately eight hundred hold tenure. The question coming from them is whether they will be allowed to teach while their status is being determined. All of these questions come at a time when the University is facing a shortage of qualified staff.

[fol. 205] The University takes a responsible attitude toward these and similar questions from its personnel and has proceeded as expeditiously as possible to deal with them, and also has faced its responsibility to administer the oaths pursuant to statute.

5. That he is of the opinion that oath forms A or B (absent the statutory requirement) is not a necessary qualification of fitness to teach or to do research at the University of Washington.

6. That he is of the opinion that the existing recruitment and personnel procedures practiced by the University

of Washington during the past seven years, and as improved from time to time during that period, are adequate to protect the legitimate public interest in securing qualified and trustworthy personnel.

7. That he is of the belief that some prospective applicants for academic positions at the University of Washington who would otherwise be fully qualified would be reluctant to accept employment there on the condition of executing Oath form A or B; consequently, this would add a difficulty to the general problem of attracting qualified academic personnel.

8. That the anticipated immediate future of the University of Washington is one of growth and expansion. The total number of students is expected to increase, as is the continuing expansion of faculty and other personnel, plant and facilities. It is expected that the University will continue to become increasingly a center for graduate and advanced professional studies, although retaining a very substantial commitment to a strong undergraduate program.

9. That the 1940 statement of principles regarding Academic Freedom and Tenure which is reproduced here below and which has been adopted and promulgated by the Association of American Colleges and the American Association of University Professors and which has been endorsed by other organizations expresses principles as to institutional and individual rights and duties which he personally endorses.

[fol. 206] *Academic Freedom and Tenure*

1940 Statement of Principles

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement, known to the profession as the 1940 *Statement of Principles on Academic Freedom and*

Tenure, was officially endorsed by the following organizations in the years indicated:

Association of American Colleges	1941
American Association of University Professors	1941
American Library Association (adapted for librarians)	1946
Association of American Law Schools	1946
American Political Science Association	1947
American Association of Colleges for Teacher Education[1]	1950
Association for Higher Education, National Education Association	1950
Eastern Psychological Association	1950
American Philosophical Association:	
Western Division	1952
Eastern Division	1953
Southern Society for Philosophy and Psychology	1953
American Psychological Association	1961
American Historical Association	1961
Modern Language Association of America	1961

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher[2] or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to

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[1] Endorsed by predecessor, American Association of Teachers Colleges, in 1941.

[2] The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

[fol. 207] *Academic Freedom*

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Academic Tenure

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for ade-

quate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be [fol. 208] permitted to have with him an advisor of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties

concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointmen because of financial exigency should be demonstrably bona fide.

Interpretations

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8, 1940, the following interpretations of the 1940 Statement of Principles on Academic Freedom and Tenure were agreed upon:

1. That its operation should not be retroactive.
2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.
3. If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on *Academic Freedom* and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a) (4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

10. That he and the presidents or Boards of at least 170 other universities and colleges publicly have stated their disapproval of the disclaimer affidavit required by the National Defense Educational Act which in his opinion is similar in some respects to the one in question here:

National Defense Education Act of 1958, Public Law 85-864, 72 Stat. 1602. Title II provides for low interest loans to students in institutions of higher education. Section 1001 (f), in pertinent part, reads as follows:

> "No part of any funds appropriated or otherwise made available for expenditure under authority of this Act shall be used to make payments or loans to any individual unless such individual (1) has executed and filed with the commissioner an affidavit that he does not believe in, and is not a member of and does not support any organization that believes in or teaches, the overthrow of the United States Government by force or violence or by an illegal or unconstitutional methods, and (2) . . . omitted . . . ".

[fol. 209] 32. If Glenn Leggett, Vice Provost of the University of Washington were called upon to testify he would do so as follows:

> "My name is Glenn Leggett, and I occupy the office of Vice-Provost of the University of Washington. This office concerns itself, among other things, with the supervision of the academic personnel records at the University of Washington.
>
> "On June 17, 1956, a physicist, who previously had been hired by the University of Washington, officially resigned that position, giving the following reason in a notice of resignation which referred to the 1955 oath requirement:
>
> > 'A position was offered me at the University of Birmingham. In light of the fact that my continued employment at Washington beyond this year will depend on factors other than my competence, and that the situation there was one that I felt reluctant

to enter into, I decided to accept the Birmingham offer. Had it not come, I believe my decision would still have been to resign.'

"Since the dissolution of the injunction in *Nostrand* v. *Little*, and the necessary resumption of requiring the execution of Oath forms A or B as a condition of employment at the University, several executive officers of various University departments have expressed their concern regarding the success with which they might attract scholars, citizens and non-citizens, to become members of the teaching and/or research faculty. In one case, there may be others, a professor at another University, who, during 1961 and 1962, was in negotiations with the University department of philosophy. He did not accept a position at the University of Washington, basing his reasons, in significant part, on the fact that the injunction had been dissolved and that he would be required to execute Oath form A.

"On June 4, 1962, Provost of the University, Frederick P. Thieme, sent a memorandum to Deans and Executive Officers of the various University departments. It instructed these university officials to begin administering Oath form A or B, whichever may be proper in each case, to the personnel employed by the University of Washington."

[fol. 210] *32a.* If Carl Pettibone were called upon to testify, he would do so as follows:

"That he is the Business Manager of Washington State University and, in the absence of the President of the University, he acts on behalf of Washington State University, which delegation of authority is with the approval of the Board of Regents of Washington State University. That C. Clement French, President of Washington State University, is out of the State of Washington on University business and will not return until August 17, 1962.

"That in his official capacity as aforesaid, he is personally acquainted with the terms and provisions of

Chapter 254, Laws of 1951 of the State of Washington and Chapter 377, Laws of 1955 of the State of Washington, which statutes contain the so-called 'loyalty oath' provisions applicable to public colleges and universities of the State of Washington, and is also familiar with the procedures used by Washington State University pursuant to such statutes.

"That Washington State University is fulfilling the requirements of the aforesaid statutes and that each and every member of the staff of Washington State University has signed the loyalty oath and other declarations as required by such statutes. No member of the staff of Washington State University has refused to sign such oath or other declaration. To his knowledge no person who has been offered employment at Washington State University has declined such employment by reason of the requirements of the aforesaid statutes.

"That to the personal knowledge of Mr. Pettibone and after making inquiry among other officials of Washington State University, he firmly believes and therefore alleges, that the existence of the foregoing statutes in the State of Washington have not had any detrimental effect on Washington State University.

"That Washington State University is a public institution of higher education of the State of Washington located at Pullman, Washington, having a current student enrollment of approximately 8,000 full-time students and a present full-time equivalent faculty and staff of approximately 2,600. That Washington State University is a University composed of several colleges with graduate curriculum, as well as undergraduate, in all colleges. That by statutes of the State of Washington many major lines of study have been divided between the University of Washington and Washington State University as exclusive major lines.

"That recruitment for new faculty at Washington State University is from major universities of the United States and without geographic limitation."

[fol. 211] Defendants do not intend to contest the following facts at trial by evidence to the contrary, and they may be admitted into evidence without objection, but defendants are unable to concede their probative value to resolve the issues in this case, and expressly reserve the right to contend to the contrary:

33. Defendants are without knowledge that any University of Washington students, graduates or ex-students have been charged in any judicial proceedings with a violation of any of the criminal provisions of the Subversive Activities Act of the State of Washington as set forth in RCW 9.80, and reproduced, in part, in paragraph 12 above.

34. Defendants are without knowledge that any guest, visitor or listener to public lectures delivered at the University of Washington has been charged in any judicial proceeding under any provision of the Subversive Activities Act of the State of Washington as set forth in RCW 9.80, and reproduced, in part, in paragraph 12 above.

35. To the knowledge of defendants no official agency of government, local, state or federal, has brought facts to the attention of the official administrative officers of the University of Washington to the effect that, as a result of the teachings and activities of plaintiffs and others similarly situated, any student or ex-student of the University of Washington is in violation of the Subversive Activities Act of the State of Washington as set forth in RCW 9.80 and as reproduced, in part, in paragraph 12 above.

36. Defendants are without knowledge that any member of the teaching faculty has been charged in any judicial proceeding with a violation of any of the criminal provisions of the Subversive Activities Act of the State of Washington as set forth in RCW 9.80, and reproduced, in part, in paragraph 12 above.

37. Defendants are without knowledge that the plaintiffs, or others similarly situated, in any way, use their positions of employment with the University of Washington to engage in or promote activities designed to achieve

the violent overthrow, by force, of the governments of [fol. 212] either the State of Washington or of the United States of America, or any subdivision of either.

38. All plaintiffs are of the opinion that they cannot execute either Oath form A or B and that they refuse to swear or affirm that they "understand and are familiar with the contents" of RCW 9.81.010(2), (3) and (5); RCW 9.81.060; RCW 9.81.070 and RCW 9.81.083, and RCW 28.70.150, "subject to the penalties of perjury."

39. Plaintiffs Halpern, Dash, Eaves, English, Jacobsohn and Geballe, and others similarly situated, have security clearances necessary for the type of work that they perform on a contract research basis for governmental and private agencies and which grants them access to classified information. These clearances have been granted by at least one of the following: the United States Atomic Energy Commission, the United States Air Force, the United States Navy or The Boeing Company.

40. All plaintiffs are of the opinion that the requirement that they sign the oaths in question is an affront to their personal and professional integrity, an abridgement of their civil liberties and constitutional rights secured and guaranteed under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

41. All plaintiffs are of the opinion that if they executed the oaths in question said execution would cause each of them emotional anguish due to having to compromise their principles, beliefs and consciences.

42. All plaintiffs fear that if they executed either Oath forms A or B that they may subject themselves to harassment and the threat of prosecution for perjury.

43. Plaintiff, Boris A. Jacobsohn, has co-authored two articles on nuclear physics with a Soviet scientist, R. M. Ryndin of the Joint Institute For Nuclear Research, Dubna, Union of Soviet Socialist Republics. One has been published in Vol. 6, No. 1, *Physical Review Letters*, January 1, 1961. The other can be found in Vol. 24, *Nuclear Physics*, pp. 505-509 (1961). Professor Jacobsohn is of the opinion

that he cannot, in good conscience, execute Oath Form A and continue to engage in the type of activities described [fol. 213] immediately above, and that his continued participation in this type of activity is essential to the proper discharge of his duties as a professor of theoretical physics at the University of Washington.

44. Plaintiffs Matchett and Orians are members of the religious order known as the Society of Friends (Quakers) and state that they refuse to swear or affirm that they "will by *precept* and *example* promote respect for the flag and the *institutions* of the United States of America and the State of Washington, reverence for law and order, and *undivided allegiance to the government of the United States.*" They are of the conviction that, by peaceful means, they must, by precept and example, affirm their undivided allegiance to their God, and further, they are of the religious conviction that something is subtracted from the dignity of a man who is forced by legal compulsion, which is the way they interpret Oath form A, no less than through the infliction of physical pain, to contribute to his own undoing.

[fol. 214] 45. Plaintiff, Boris A. Jacobsohn, is Director of the Summer Institute for Theoretical Physics and a senior faculty member in the department of physics. The last meeting was held during the summer of 1962 in Seattle, Washington. If Professor Jacobsohn were asked to testify regarding his conversations and associations engaged in during the Summer Institute, he would state:

> "I am at present Director of the Summer Institute for Theoretical Physics. This is a group of theoreticians from the U. S. and abroad who are spending part or all of the summer here doing research in theoretical physics. The Institute is supported by a grant from the National Science Foundation to the University, and I believe that all participants are technically University employees. It has been a great honor to the University to serve as host over an extended period to a group as outstanding as this one, and it is expected that we will be able to repeat this Institute every sec-

ond summer. The students and the faculty have benefited from a series of seminars and personal contacts, the quality of which could only be duplicated at a few places in the world. While I have not had time to poll many of the participants at present in residence, I have spoken to several of them. Professor Gerald E. Brown (an American citizen), Professor of Theoretical Physics at the Nordic Institute of Physics, Copenhagen, Denmark, has told me flatly that he would not come for a short or long period to a university which made as a condition for his employment the signing of our oath. Professor R. E. Peierls, Professor of Theoretical Physics at the University of Birmingham, England, and, commencing in 1963, Professor of Theoretical Physics at Oxford University, has told me that it would be out of the question for him to sign an oath which contains the first paragraph of our present oath. While he recognizes the possible necessity of similar oaths on visas for internal security reasons, he would be extremely reluctant to sign an oath such as the 2nd and 3rd paragraph of ours as a condition for visiting a university. He emphasized that he makes frequent trips behind the Iron Curtain, that he has many contacts with Soviet, Polish, and other Eastern scientists; furthermore he will be a participant in the forthcoming "Pugwash" Conference (to be held in England) in which Soviet and other scientists will exchange views on disarmament and nuclear weapons control. Dr. Richard Eden of Clare College, Cambridge University, has told me that he could not sign the first part of the oath, and Dr. Peter Landshoff of St. John's College, Cambridge University, has stated flatly that he would sign no part of it.

"It is clear to me that if the taking of such an oath were a necessary condition for employment at the University, we could no longer expect to be able to have gatherings of distinguished people such as this. The University as a whole would be injured, and the students and faculty would suffer from a narrowing of horizons. In particular I myself would lose one of the

privileges which I regard as concomitant to being part of a first-rate university: the opportunity for stimulation and growth which comes from constant contact with scientists from all over the world."

[fol. 215] *46.* The following plaintiffs have engaged in the activities and associations listed below and believe them to have been part of their professional obligations:

(1) *Philip E. Wilcox*:

a. In January of 1959, Professor Wilcox accepted Dr. Josef Lisowski of the Ludwik Hirsfelds Institute of Immunology and Experimental Therapy, Wroclaw, Poland, to work in his laboratory at the University of Washington and later recommended that Dr. Lisowski be appointed as a research associate in the University. Dr. Lisowski was in the United States obtaining information for the purpose of training Polish scientists in Polish universities under a program approved by the United States Department of State and the Polish Communist government. He has returned to Poland.

b. In September of 1959, Professor Wilcox met and discussed scientific matters and the ways in which the training of Polish scientists could be facilitated with Professor Stephen Slopek, Director of Hirsfeld Institute, Poland. Professor Slopek is a member of the Polish Academy of Sciences and the Communist Party.

c. In August, 1961, Professor Wilcox became a member and attended the Fifth International Congress of Biochemistry in Moscow, U.S.S.R. where he presented a scientific paper. At that time he visited the laboratory of Professor Vainshtein, Institute of Crystallography, Academy of Sciences, and advised Professor Vainshtein about the development of techniques useful to his field of research.

(2) *William A. Dawson*

a. Professor Dawson is a dues-paying member and actively supports the work of the International Phycological Society which has on its executive council one A. D. Zinova of the Botanical Institute of the Academy of Sciences of the Union of Soviet So- [fol. 216] cialist Republics.

(3) *Robert G. Fleagle*

a. Professor Fleagle has participated in meetings and exchanged information with Russian scientists at the following international meetings:

1. International Union of Geodesy and Geophysics, Toronto, Canada, 1957.
2. International Association of Meteorology and Atmospheric Physics, Oxford, England, 1958.
3. International Union of Geodesy and Geophysics, Helsinki, Finland, 1960.
4. International Association of Meteorology and Atmospheric Physics, Marseilles, France, 1961.

b. Professor Fleagle has served on national and international planning groups for the International Indian Ocean Expedition.

c. Professor Fleagle is Chairman of the Committee on Atmospheric Sciences of the National Academy of Sciences and which has been charged with the duty of planning a Symposia for 1963 to be held in California. It is inevitable that Professor Fleagle will come into close association with Soviet scientists, learning from them and giving them information.

(4) *T. Saunders English*

a. Professor English engages in oceanographic research in the area of the Arctic Ocean where there is a historical and continuing overlapping of United States and U.S.S.R. interests. In 1959, he attended the International Oceanographic Congress at the

United Nations and while there engaged in associations and exchanged information with Soviet scientists.

(5) *Patricia J. Keller*

a. In 1961, Professor Keller attended the International Congress of Biochemistry which was held in Moscow, U.S.S.R. At that time she exchanged information with Soviet scientists, some of whom were mem- [fol. 217] bers of the Communist party, and engaged in other professional associations.

The above named plaintiffs, Philip E. Wilcox, William A. Dawson, Robert E. Fleagle, T. Saunders English, Patricia J. Keller, are of the opinion that they cannot, in good conscience, execute Oath form A and continue to engage in the activities and associations described above, but that such activities and associations are essential to the proper discharge of their professorial duties.

[fol. 218] 47. If plaintiff, W. Stull Holt, were asked to state his opinion regarding his reasons for refusing to execute Oath form A, he would testify as follows:

"I refuse to sign Oath form A.

"I am a professor of American history. I give each year a survey course on the history of the United States for undergraduates, the class usually having 120 to 180 students. I also give each year a two quarter course on the history of American foreign relations, 1776 to 1960. The students who are mostly seniors and juniors numbered this past quarter, fifty-six.

"My formal education brought me an A.B. degree from Cornell, 1920, and a Ph.D. degree, from Johns Hopkins, 1926.

"My academic positions have been: Staff, Brookins Institution, 1921-1924, 1926-1927; Assistant Professor, George Washington University, 1927-1930; Assistant and Associate Professor, Johns Hopkins University, 1930-1940; Professor, University of Washington, 1940—; Chairman of the History Department, 15 years.

"I have taught as a full professor in summer sessions at: Harvard, Columbia, Stanford, University of Southern California, University of British Columbia, Salzburg Seminar in American Studies, and have given individual lectures at other universities and colleges.

"I served as an officer in both World War I and World War II and took the usual oath to support and defend the Constitution and the United States Government. In 1917-1919, I flew as a 1st Lieutenant, and was decorated with the American Silver Star and the French Croix de Guerre. In World War II, I served as a Lt. Colonel for three years in Europe and was decorated with the American Bronze Star and the British O.B.E. (Officer of the Order of the British Empire).

"Some of the professional distinctions or positions indicating my standing in the academic world are:

a. Author of eight books, of chapters or sections in a number of other books, of various articles and notes.

b. Elected in 1957, by national vote, as one of two to the Council of the American Historical Association for four year term.

c. Elected in 1952 as President of the Pacific Coast Branch of the American Historical Association.

d. Elected in 1954 to Executive Committee of the Mississippi Valley Historical Association for three year term.

e. Elected in 1958 by national vote to Council of the American Association of University Professors (50,000 members) for three year term.

f. Appointed member of Board of Editors of Mississippi Valley Historical Association, 1961—.

g. Appointed in 1956 by Secretary of the Army to the Advisory Committee, Officer of the Chief of Military History, for five year term.

[fol. 219] "I think the two best books on the history of loyalty oaths in the United States have been written by Harold Hyman, *The Era of the Oath* (1954) and *To Try Men's Souls: Loyalty Tests in American History* (1959).

"As a full professor, I have tenure on the faculty, which is defined in the Faculty Code approved by the Board of Regents. A copy of the Code was given to me when I was appointed in 1940. It was then, and has been ever since, the practice of the University to give a copy of the Code to each newly appointed member of the faculty. The provisions relating to tenure are essentially the same as in 1940, except for the May 26, 1962 action by the Board of Regents.

"I received the 1962 oath from the Acting Chairman of the Department.

"I informed him by letter I refused to sign it as a matter of principle, because it is, I believe unconstitutional, because it is so vague in terms it infringes my rights and liberty under the Constitution of the United States and because it conflicts with my scholarly and personal life.

"The oath requires me to swear that I 'will by precept and example, promote respect for the flag and the institutions of the United States of America and the state of Washington.' Truth, which is, and must be, the first obligation of a professor of history, compels me to state and explain to my classes that the United States has acted improperly on a number of occasions, such as the use of force on the occasion of the revolution in Hawaii in 1893, or the intervention by threat of force in Columbia at Panama in 1903, or the threat to Denmark in 1916, that if the Danish West Indies were not sold to the United States, they might be taken by force without payment. My conclusions on these episodes are based on my evaluation of the evidence but are not unique since a large majority of American historians share them. What I fear if I sign the oath is that I would have to compromise my conscience and my professional obligation to search for truth and that some member of the class will report my statements

about the past improper actions of the United States and that I will be charged with perjury on the grounds that I am a 'subversive person' or that I am violating the oath to promote respect for the flag and an undivided allegiance to the United States. Various superpatriotic societies, like the John Birch Society, collect from students statements made by professors in their classes. I do not believe that I can execute Oath form A and continue to discuss these matters as I have in the past."

[fol. 220] 48. If plaintiff, C. A. Valentine, were asked to state his opinion regarding his reasons for refusing to execute Oath form A, he would testify as follows:

"I have been a Visiting Assistant Professor at the University of Washington since September, 1961. This is an annual type of appointment which has been renewed for the coming year with a raise which brings my salary up to $7,500 for the nine-month academic year. The courses which I have taught or will teach here include Introduction to Anthropology, Personality and Culture, Childhood and Society, Psychological Aspects of Culture, Cultures of the Pacific, Non-Western Political Systems, and Theories of Race.

"I received a B.A. degree with honors and major distinction in 1951, an M.A. in 1953, and a Ph.D. in 1958, all in anthropology and all from the University of Pennsylvania. I am a member of the Phi Beta Kappa general honor society and the Sigma Xi scientific research honor society. I am a fellow of the American Anthropological Association and a member of the American Association for the Advancement of Science and the American Association of University Professors. Beginning in 1954, I held a Fulbright Scholarship for two years at the Australian National University. During the academic year 1960-61 I was awarded a Mellon Post-Doctoral Research Fellowship at the University of Pittsburgh (Pennsylvania). In addition to the University of Washington I have taught at the University of Pennsylvania and Kansas. I have published one book and a number of articles in my field.

"My reasons for refusing to sign the oath are as follows. I believe that the requirement to sign the oath violates the principles of freedom of speech, freedom of conscience, and privacy of belief as protected by the First Amendment of the Constitution. I feel that the oath requirement threatens loss of liberty or livelihood without due process of law as guaranteed by the Fifth Amendment. I am convinced that the imposition of the oath would violate academic freedom, penalize independent thought, and deter discussion of controversial issues. It is clear to me that such an oath is inconsistent with reasonable qualifications for academic employment and serves no useful purpose not already accomplished by existing laws, regulations, and hiring procedures. As a scholar and teacher I feel that imposition of the oath is an affront to my integrity. I believe that the state has no right to impose such requirements, not only because they conflict with the ideal of a free society but also because they violate the First, Fifth, and Fourteenth Amendments.

"Apart from these general considerations, it is impossible for me to sign the oath in good conscience because its wording is so extremely vague as to what is prohibited. Although I am not a member of the Communist Party, neither the language of the oath nor the phraseology of the statutory definition makes it clear to me whether or not I can truthfully swear that I am not a member of a 'subversive organization' or a 'subversive person'. Under the definition stated in the relevant statute I do not know what a subversive organization is. On the basis of such vague and inclusive terminology in this definition as 'abets,' 'teaches,' 'alter,' and 'revolution,' the American Civil Liberties Union, to which I belong, might be classified as a subversive organization.

"I refuse to sign Oath form A. If I were to sign the oath, I would feel that I had been forced to declare [fol. 221] falsely that I hold a number of important beliefs to which in fact I do not subscribe. For example, although I support the general concept of 'the law'

as part of our social system, there are many specific laws which I do not support in any sense. These include the MacCarran Act and the Smith Act, restrictive immigration and passport laws, the Landrum-Griffin Act and other labor laws, and most legal provisions which outlaw gambling, prostitution, abortion, contraception, and the use of certain narcotics.

"Signing the oath would have an important effect on my personal and professional life. I would be forced to make the following choices repeatedly and in many different social contexts. Either I would have to violate the oath, thus risking the penalties of perjury as well as those of conscience, or I would have to make numerous changes in both my scholarship and teaching and also in my public and private expression of political and related views. I speak now about both the '1931' and '1955' oaths. For example, in my teaching of anthropology, particularly introductory and other undergraduate courses, I give an important place to exposition of the philosophical position of cultural relativism, according to which each social or cultural system is judged in terms of its own values rather than the alien criteria of our own society.

"Some of my courses include extensive critical analysis of racist beliefs and practices which underlie segregation, a social institution, of the United States, unlawful in certain instances. In teaching an introduction to genetics and human evolution I regularly emphasize the genetic and other physical effects of atomic radiation and fallout.

"Every course that I teach involves extensive description and exposition of non-American and non-Western beliefs and behavior patterns which are highly inconsistent with our own culture. Although I do not attempt to impose specific comparative value judgments, I do constantly encourage students to compare non-American culture patterns with their own and to develop a degree of empathy with alien beliefs and customs.

"Specific social and cultural features which I refer to repeatedly in this context include the left-wing Kibbutzim of Israel, which have practically abolished the family as it is usually defined, the Chinese communes which have apparently involved an attempt to accomplish something similar to this, a wide variety of non-monogamous marriage and family patterns, various non-Capitalist economic systems, a broad spectrum of non-republican political structures, a host of exotic religious beliefs and practices, and many specific items such as the absence of warfare among certain Eskimo groups. An example of a specific comparison which I make is between the thousands of victims of human sacrifice among the 'bloodthirsty' ancient Aztecs and the tens of thousands killed with one bomb by 'peace-loving' Americans in 1945.

"In courses which touch on colonial history or culture change in underdeveloped areas, numerous instances come up in which it becomes clear that the U. S. government has acted unwisely, aggressively, or destructively in its relations with non-Western peoples. Most examples of this sort refer to the destruction of the American Indian, but there are also more recent instances such as the forced removal and exposure to fall-out of Pacific islanders in the U. S. Trust Territory.

"Similar difficulties would arise with respect to a much wider variety of issues on which I often express [fol. 222] myself in informal contact with students, in private conversations generally, and occasionally in public gatherings. As in all the examples just given as well, I would be deterred and inhibited by the oath from expressing the kinds of views I cited earlier because I might be labelled a 'subversive person' and be prosecuted or dismissed from my employment."

[fol. 223] 49. If plaintiff, Kenneth E. Read, were asked to state his opinion regarding his reasons for refusing to execute Oath form A, he would testify as follows:

"My name is Kenneth E. Read. I am an Associate Professor of Anthropology at the University of Wash-

ington and Chairman of the Department of Anthropology. I hold the degrees of Master of Arts (First Class Honours in Anthropology) of the University of Sydney, Australia, and Doctor of Philosophy of the University of London, Great Britain. Prior to my appointment at the University of Washington I held the position of Research Fellow, School of Pacific Studies, The Australian National University, Canberra, Australia and subsequently that of Senior Lecturer in Anthropology, the Australian School of Pacific Administration, Sydney, Australia. I have been a member of the Council of the Anthropological Society of New South Wales and of the Seattle Anthropological Society. I have been President of the Seattle Anthropological Society. I am a Fellow of the Royal Anthropological Society of Great Britain and Northern Ireland, of the American Anthropological Association, a member of the British Association of Social Anthropologists, of the Anthropological Society of New South Wales and of Sigma Xi. I have been the recipient of a Fellowship from the Bollingen Foundation, New York and I am the sponsor of several research grants financed by the United States Department of Public Health.

"I refuse to sign Oath form A.

"I am not a citizen of the United States and I feel strongly that the wording of the oath is incompatible with my Australian citizenship, which I am very reluctant to jeopardize. I arrived at the University of Washington in January 1957 to accept an appointment for one year as Visiting Associate Professor of Anthropology. I was at that time Senior Lecturer in Anthropology at the Australian School of Pacific Administration, which granted me one year's leave of absence to visit the University of Washington. When I accepted this visiting appointment I was not informed that an oath of any nature might be required of me. Towards the end of 1957 I was asked if I would extend my appointment at the University for a second year. I agreed, with the added provision that my employers

in Australia grant me an extension of my leave of absence. I received the necessary extension of my leave. In 1958 I was asked to accept permanent employment at the University of Washington at the tenure rank of Associate Professor in Anthropology. In order to accept this offer I had to resign my appointment in Australia and, as an alien, I had to be sure that I would be permitted permanent residence in the United States. I had entered the country on an Exchange Visitor's Visa, which permits only a limited period of residence and which carries the legal stipulation that on the expiration of the visa the person concerned must leave the United States for two years. Both the Department of Anthropology and the University of Washington made representations to the United States Department of Justice on my behalf, with a view to securing a waiver of the Public Law which would have compelled me to leave the country and to securing for me an Immigrant's Visa which would allow me permanent residence. After protracted negotiations the United States Department of Justice waived the Public Law in my favor and I was eligible to apply for an Immigrant's Visa with First Priority under the Australia quota. Since my ability to remain in the United States seemed assured I resigned my position as Senior Lecturer with the Australian School of Pacific Administration and accepted the position of Associate Professor [fol. 224] of Anthropology at the University of Washington. I was at no time informed that an oath of any nature might be required of me as a condition of my employment by the University. Had this been pointed out to me I would not have resigned my position in Australia and would not have accepted employment at the University of Washington. I believe that I cannot swear undivided allegiance to the United States while I am a citizen of another, friendly, country. I am of the same conviction regarding the oath required by the Subversive Activities Act of the State of Washington.

"As I have remarked, I was not advised of the possibility that an oath would be required of me when I accepted employment with the University of Washing-

ton. When hired I was not questioned about my political beliefs nor have I been subjected to any additional screening concerning my beliefs since then. In resigning from my position in Australia I believe that I have plainly indicated that I had intended to remain at the University of Washington. I have no doubt that the University of Washington presently offers the best facilities in the State of Washington for me to pursue my profession. I believe, too, that it presently offers better facilities than those available in Australia. Indeed, this judgment is responsible for my decision to resign from my position in Australia and to accept employment here. But, I find myself in a dilemma. My refusal to sign Oath form A opens the distinct possibility that I will lose my employment at the University. Yet, if I were to sign, I might jeopardise, or lose, my Australian citizenship, or perhaps, risk being declared a 'subversive person.' The question therefore arises as to what effect this would have upon my personal and professional life."

[fol. 225] *50.* If plaintiff, Rhoads Murphy, were asked to state his opinion regarding his reasons for refusing to execute Oath form A, he would testify as follows:

"I am Professor of Geography and Member of the Far Eastern and Russian Institute at the University of Washington. I am also Editor of the *Journal of Asian Studies*, published by the Association for Asian Studies, the leading American academic professional organization for scholars in the field of Asian studies, and serve in addition as a consulting editor for *Encyclopedia Britannica*. I hold the degrees of A.B., M.A., and Ph.D., all from Harvard University. I teach courses in the Historical Geography of China (including Communist China), The Civilization of India, and Introduction to Geography. In addition I offer seminars for advanced graduate students in the field of Asian studies. Whether I remain at the University of Washington will depend on the outcome of this suit.

"I will not sign the oath, now or at any other time. I regard it as unacceptable to me as a teacher and scholar because it destroys the freedom of inquiry on which both teaching and scholarship depend. This is so as a matter of principle, inherent in any such oath; in addition, the present oath is extremely vague and hence doubly objectionable. I feel that the state has no right to require the oath in that the oath unduly infringes my rights and freedoms guaranteed under the Constitution of the United States. Enforcement of this oath would do irreparable harm to the University of Washington; it would repel or drive away valuable faculty, and would seriously damage or destroy the freedom of inquiry on which this and every other great university depends for its very life. Enforcement of the oath would have the effect of crippling a sound development, and would so damage the university's prestige in academic circles in this country that it would no longer be regarded as a serious or acceptable center of teaching or learning. Finally, enforcement of the oath would work a fundamental harm to the university in that it would bar the employment of aliens; any great university is necessarily an international center for the exchange of knowledge. Knowledge knows no national frontiers and is not concerned with citizenship or national allegiance. To cut a university off from prolonged and continual contact with scholars and teachers from other countries is further to cripple its development.

"As Editor of the *Journal of Asian Studies*, the leading American learned journal devoted to research in the humanities and social sciences concerned with Asia, I am responsible for managing exchanges of publications with the U.S.S.R., and am in frequent correspondence with Communist academicians and learned societies on a variety of matters of common professional interest. I shall shortly represent the Association for Asian Studies (which publishes the *Journal*) at the International Congress of Orientalists to be held in Delhi. Many of the scholars attending will be Communists, and I shall be engaged in frequent meetings and discussions with them.

"If I signed the oath, I would not feel that I could discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses which I teach and of the field in which I work. It is not possible, for example, to deal adequately with communism in China or with important aspects of the political and economic systems in India and southeast Asia without discussing controversial matters which I would not feel free to attempt if I signed the oath. The policy of the United States in those parts of the world [fol. 226] and the administration of United States aid are also issues which require free discussion in the courses which I offer and which I would feel constrained from discussing freely. United States nonrecognition of Communist China, the United States role in the Chinese civil war of 1947-49, the United States position on Formosa, United States military aid to Pakistan and Viet Nam, and United States policy toward India, including its policy on economic aid to India, may all legitimately be criticized and should be subjected to free discussion in any course dealing with the modern period in Asia. If the oath were imposed upon me, I would not feel that I could teach honestly and effectively. Similarly, in the course, Introduction to Geography, which I also offer from time to time, it is appropriate and necessary for me to discuss, among other things, United States policy toward the use of American resources, which may also legitimately be subjected to criticism, the role of superabundant natural resources rather than of a particular economic or political system in accounting for the development of a high standard of living in the United States, the virtues of the T.V.A. as a method of resource management, and the regrettable absence or weakness of planning in the growth of American cities. These and other controversial points are set forth in detail in Chapter 36 of my textbook, *An Introduction to Geography*, Rand McNally, 1961. If I signed the oath, I would not feel that I could discuss them, or encourage

students to discuss them, and hence would not feel that I could in honesty teach.

"Adequate machinery already exists at this university for the identification, investigation or hearing, and dismissal of persons who are genuinely subversive or who for similar reasons are unfit as teachers or scholars. The Faculty Code, (Chapter 25, Section 2551) provides for dismissal for cause of members of the faculty, with provision for a hearing, which may have been rendered ineffective due to the action of the Board of Regents on May 26, 1962. Section 1 of Part B of the Report of the Administrative Committee on Appointment Policy as published on page 19 of the Faculty Handbook, Vol. II, 1958, reads in part:

'Each (member of the faculty) must possess deep personal and intellectual integrity, a free mind, and be dedicated to objective search for truth and its honest and complete presentation. The University should avoid harboring within its faculty any who are dedicated to the destruction of our liberties and our free institutions, upon which universities depend for their effective functioning.

'The wisest of appointment policies will fail if the men chosen will not accept the posts offered them, or if, having accepted, they find conditions at the University which make it difficult or impossible for them to make their proper contributions. Once an able and responsible faculty has been appointed, the community and the University have further to provide facilities and atmosphere which will permit this faculty to function properly. Important in this connection is an atmosphere of freedom, in which scholars may give expression to their new contributions, even if some of the ideas prove to be strange or unpopular. For the United States and its universities have grown to greatness in a climate of free enterprise and initiative which has provided the flexibility and adaptability to changing conditions necessary for a flourishing economy and society. The basic freedoms of individual thought, religion speech

press, political participation, and economic opportunity, all these along with free universities form a mutually interrelated group of institutions upon which depend the continued welfare and preserva-
[fol. 227] tion of our free society.

'With these considerations in mind, the University of Washington must fulfill with sound judgment, determination, and conviction its responsibilities to the people of the state. It is responsible to all the people, not to any minority or pressure group, be it political, religious, or economic. The University should promote originality of thought, encourage free discussion, and provide for the advance and dissemination of learning without permitting itself to be used as a focus for violent and unconstitutional assaults on our free democratic institutions. The citizens of the state of Washington expect their University to assume its obligations fully, with wisdom, diligence, and courage, in the interests of the people and their future, without permitting itself to be diverted from this high purpose by intimidation, dictation, or veto of any group, however vocal or persistent.'

"There is clearly no question that the University is fully alive to the dangers which an irresponsible or disloyal person might present as a member of its faculty, and that it has established guide lines and specific machinery with which to deal appropriately with such cases. At the same time, the statement quoted above makes it clear, as does the rest of the Report from which it was taken, that the requirement of this oath would unduly and inappropriately limit the freedom of inquiry which the University has declared is of vital importance to its basic purposes.

"For these reasons, I refuse to sign Oath form A."

[fol. 228] 31. If plaintiff, Melvin Rader, were asked to state his opinion regarding his reasons for refusing to execute Oath form A, he would testify as follows:

"My two fields of teaching and research are aesthetics and social philosophy. Among my courses are the Philosophy of History (which includes the study of the Marxian theory of history), Social Ethics (which includes a comprehensive interpretation of Communist social ideals), Social Philosophy (which includes the study of Marx and Engels), and a seminar in Marxism (offered in the past and to be offered again in the Winter Quarter, 1963). In my course in the Philosophy of Art I have regularly included an account of the Marxian theory of art; and in occasionally teaching Introduction to Philosophy, I have included the study of Communist social philosophy. I sometimes teach special courses, such as Human Rights (Autumn, 1961) and Philosophic Issues in World Affairs (Autumn, 1960 and 1962), in which I deal with Communist ideology. In all of these courses, I use original Communist source material, such as Marx's *The German Ideology*, the *Communist Manifesto*, and Lenin's *State and Revolution*.

"In quite a number of articles and books I have written about Communist theory or related matters. The following may be worth mentioning:

A Modern Book of Esthetics. New York: Holt, 1935; 2nd edition, 1952; 3rd edition, 1960. The second edition has been translated into Russian and circulated in the Soviet Union.

No Compromise. New York: Macmillan; London, Gollancz, 1939. This was the October 1939 choice of the English Left Book Club.

"Soviet Ideals and Postwar Cooperation." In Robert Mosse (ed.), *Soviet Far East and Pacific Northwest*. Seattle: University of Washington Press, 1944.

"Toward a Definition of Cultural Crisis." *Kenyon Review*, Spring, 1945.

"The Moral Basis of Peace" (with Linden Mander) and "International Protection of Individual Freedom within the State." In *If Men Want Peace*. New York: Macmillan, 1946.

"Soviet Communism." In *Twentieth Century Political Thought.* New York: Philosophical Library, 1946.

Ethics and Society. New York: Holt, 1950. (Contains a chapter on Marxism). "The Profession of Perjury." *New Republic,* July, 1954.

The Enduring Questions. New York: Holt, 1956. (Contains a chapter on "Communism and Western Ideals").

"The Artist as Outsider." *Journal of Aesthetics and Art Criticism,* March, 1958. (This article has been reviewed, somewhat favorably, in a Soviet journal).

"Community in a Time of Stress." *University of Colorado Studies in Philosophy,* 1961.

"On Teaching About Communism in the Public Schools." *College of Education Record,* May 1962.

[fol. 229] "Aesthetic Alienation and Creativity in the Early Works of Marx." To be read at the annual meeting of the American Society for Aesthetics, Boston, October 1963.

Ethics and the Human Community. New York: Holt, Rinehart, and Winston, to be published in 1963. This will contain an interpretation of Marxian ethics and social ideals.

"I have held the following offices in the following organizations (incomplete list):

1. Vice-President (1944) and President (1953) of the Pacific Division of the American Philosophical Association.
2. Member of the Executive Committee of the University Senate for a number of terms (three separately spaced terms). I am presently a member of the Senate.
3. Member of the Honorary Overseas Board of the Australian County Library Association, 1940-1941 (a three member Board, of which H. G. Wells was a member).

4. Member of the Board of Trustees of the American Society for Aesthetics, 1957-1959.
5. Chairman of the University of Washington Committee on Post-War International Problem, affiliated with the national Universities Committee on Post-War International Problems, Ralph Barton Perry, Harvard, Chairman, 1941-1944; with the assistance of the Carnegie Endowment for International Peace.
6. President of the American Civil Liberties Union of Washington State, 1957, 1961-1962.

"I consider the University of Washington the best place to pursue my profession, and I doubt very much if I could secure comparable employment elsewhere. Its library is the finest in the Northwest for my purposes, and I should not want to leave it. But, I refuse to sign Oath form A.

"Since I am a professor of social philosophy, my political beliefs have a most direct and intimate relation to the subjects I teach. I could not abandon my fundamental convictions or muffle my true opinions without the sacrifice of my professional integrity. The freedom to follow reason and evidence wherever they may lead is fundamental to my whole career. I could not continue along these lines and also execute Oath form A.

"The threat of perjury following execution of Oath form A has serious implications for a teacher like myself, who does not belong to the Communist Party, nor share its convictions, but who has expressed heterodox opinions and has belonged to suspect organizations. Such a teacher is forever in danger that, maliciously or mistakenly, he will be charged with membership in the Communist Party or some other form of 'subversion.' He may find himself, then, subject to prosecution for perjury with all the difficulties inherent in attempting to refute an unjust allegation which, in the light of the evidence available, may be irrefutable. My own experience is a vivid demonstration of this

danger, and so long as I maintain my intellectual independence and integrity, which I fully expect to, it will continue to be a danger to me in the future.

"Some of the most pertinent facts are as follows: In [fol. 230] the summer of 1948 the Canwell committee investigating 'loyalty' at the University of Washington tried to establish that I had been a sponsor, member, or associate of some dozen or more organizations whose activities closely paralleled the Communist Party Line. Some of these organizations, such as the American League Against War and Fascism, the Medical Bureau to Aid Spanish Democracy, and the Independent Citizens Committee of the Arts, Sciences and Professions, I had joined some years previously; others I had never been affiliated with. A number of witnesses before the Committee charged me with aiding the Communists. One person accused me of having been a member of the Communist Party. This witness, George Hewitt, had himself been a member of the National Committee of the Communist Party. He swore that he had been my teacher at a highly secret Communist School near Kingston, New York, for a period of about six weeks in the summer of 1938 or 1939, later declaring that he was positive the date was 1938. I made a categorical denial under oath and offered evidence that I could not have been in New York at the time stated. The next day the Canwell Committee, finding the King County Prosecuting Attorney intent upon investigating the possibility of perjury, spirited their witness out of the state.

"In a unanimous report to the 31st Washington Legislature, January 1949, the members of the Committee charged me, rather than Hewitt, with perjury. Their report stated: 'In the case of Melvin Rader . . ., the Committee's investigating staff and an agency of the Federal Government have produced evidence showing conclusively that Professor Rader did not tell the truth when he testified before the Committee.' They also repeated the charge, 'shown by the fully authenticated and documented records' of the Committee,

that I had been closely associated with 'twelve organizations which have been officially cited as Communist Fronts and subversive.'

"Despite such charges by the Committee and its witnesses, Prosecuting Attorney Lloyd Shorett and his successor Charles Carroll investigated the facts. Hewitt was finally indicted for perjury and arrested in New York State. He resisted extradition, and Manning Johnson, another former member of the National Committee of the Communist Party, rushed to his defense. In an affidavit signed on September 20, 1948, Johnson declared that he personally remembered me as having been present at the Communist Party School near Kingston, New York, in the summer of 1938, and that he further met me at Communist Party headquarters in New York City on various occasions during the same summer. Another former Communist, George Peters, signed an affidavit to similar effect.

"Later, at a habeas corpus hearing in Judge Aaron J. Levy's court in New York City on May 12, 1949, after being shown a picture of me, Johnson testified that he had seen the person pictured 'a number of times, going in and out of the office' at the Communist Party's national headquarters in the summer of 1938; further he swore that he had visited the Communist school during the summer to deliver a lecture, and 'during the course of my lecturing . . . I had the occasion of seeing Professor Rader. He was one of the students in that class.' On cross-examination, he was twice asked if he was 'positive' about his identification. His answer was, 'I'm positive.' Again, George Peters took the stand and swore that he had seen me at the Communist School near Kingston in the summer of 1938. He declared that 'everybody there was a Communist.'

"Judge Levy thereupon sustained the writ and lifted Hewitt's arrest, stating in court: ' . . . I am convinced that this man (Hewitt) committed no crime whatever; that if perjury were committed, it was committed by Melvin Rader, and that he ought to be the subject of a grand jury quiz rather than this accused.'

[fol. 231] "Subsequent investigations by the Seattle *Times*, Professor Vern Countryman of the Yale Law School, and now Dean of the School of Law at the University of New Mexico, and Attorney General Smith Troy of the State of Washington, established beyond all doubt that I had been in Washington during the whole summer of 1938. Dean Countryman has written his account in his book entitled *Un-American Activities in the State of Washington*. After reviewing the unassailable evidence, President Raymond Allen of the University issued a statement exonerating me from Hewitt's charges. The fact remains that three sworn witnesses impugned by testimony; an official committee of the State Legislature charged me with false swearing; a New York judge asserted that I should be subject to a grand jury investigation; my reputation was clouded and my job was in jeopardy for well over a year. During that time I was repeatedly attacked in newspapers, Canwell demanded my prosecution for perjury, and on one occasion a radio broadcaster reported that I was a Communist (I collected $5,000 from a libel suit because of this charge). Also, I tried to arrange a loan at my bank just after the Canwell committee hearings; and for the first and only time in my life I was refused. I believe Oath form A is a substantial threat to my property rights and my good reputation for purposes of obtaining credit.

"That the attacks upon me are not merely events of the remote past is indicated by what has transpired in the past year. At the invitation of State Superintendent of Public Instruction Louis Bruno, I participated in a meeting of a Lay Citizens' Advisory Committee in Olympia, September 27, 1961. At this meeting the subject of discussion was the ticklish question: whether teaching about Americanism, Communism, or both was a proper responsibility of the public schools, and, if so, by what means and methods should the teaching be conducted. Pleading for academic freedom, I found myself personally attacked by Mr. Paul

Stoffel, editor of the Pullman Herald and President of an Association of Newspaper Editors, who 'reminded' the Committee of my past associations and affiliations. These charges were subsequently spelled out in detail by Mr. Stoffel in long editorials in his newspaper, October 5, and November 2, 1961. Citing the Canwell Committee investigation, Mr. Stoffel charged that I had been active in thirteen 'Communist-front' organizations, cited Hewitt's testimony against me, accused me of bringing to the Olympia meeting 'two persons who evidently shared (my) views that nothing derogatory of Communism should be taught in the schools,' declared that I had never, to his knowledge, taken a stand contrary to the Communist Party line, and clearly implied that I was a master of deceit. Also in the spring of 1962 a published letter by Douglas Dix, student, to the editor of the University of Washington *Daily* called attention to the evidence against me in the Canwell Committee's Report of its investigation of the University of Washington.

"Finally, my work as President of the American Civil Liberties Union of Washington and the work of the Union has been subjected to very heavy criticism. This type of attack is extremist, but it is not uncommon and may become much more virulent in the future. Another very profound depression, or the outbreak of war against the Communist nations, could quickly produce a national hysteria with its concomitant of extreme repressive measures. That, in the event of my having signed the oath, I would then be charged with perjury, does not appear at all unlikely."

[fol. 232] *52.* If plaintiff, Paul Dietrichson, were called upon to testify and asked to give his reasons for refusing to execute Oath form A, he would testify as follows:

"I am an Associate Professor with tenure appointment, received my Ph.D. in philosophy at Yale, have taught philosophy at Wheaton College in Norton, Massachusetts (1951-54), at Yale (1954-55), and have been teaching at the University of Washington since 1955.

"I am a Norwegian citizen and a permanent resident of the United States, where I have lived for 16 years.

"About three years ago, I applied for a Docentship (Associate Professorship) at the University of Oslo. Several months ago, I was informed that I had won in the competition and had been appointed to the Docentship. Since my wife (who is an American) and I are at present uncertain whether we would prefer to live permanently in Norway or in this country, I have applied for—and have been granted—a year's leave of absence from the University of Washington to teach and do research at the University of Oslo. During the coming academic year, when I will be working as a Docent at the University of Oslo, I shall be making the final decision as to whether my family and I will settle permanently in Norway or in the United States. The authorities at the University of Oslo are willing to let me try out the position there for a year before I make my final decision. (I shall be leaving the country on August 25, and Seattle on August 17.)

Courses and Research.

"My main fields of teaching and research are philosophy of religion, existentialist philosophy, metaphysics and metaphysical foundations of ethics. I have published articles and reviews on those subjects in various American and European journals and am at present writing a book on Kierkegaard's philosophy. The David Swenson-Kierkegaard Memorial Fund has awarded me a research grant for writing that book; it will be published by Prentice-Hall in the Spectrum Series. I have also collaborated with three of my colleagues on an introductory text, *Introduction To Philosophy*, which will be published by Wadsworth Publishing Company next month. I have read papers at meetings of a number of philosophical associations in this country.

"I do not see how a person who is *himself* unable to swear (or affirm) undivided allegiance to the Government of the United States of American can solemnly swear (or affirm) that he will by precept and example promote *in others* such undivided allegiance. As a Norwegian citizen it is of course impossible for me to swear (or affirm) undivided allegiance to the Government of the United States. I am therefore simply not in a position to 'swear (or affirm) that I will . . . by precept and example promote . . . undivided allegiance to the government of the United States'—any more than a United States citizen with permanent residence in Norway would be in a position to swear (or affirm) that he will by precept and example promote undivided allegiance to the government of Norway.

"If signing the loyalty oath is to be made a condition of continued employment for any teacher on the faculty of the University of Washington, all foreign teachers would have to be dismissed. I believe such a nationalistic restriction on the free search for knowledge in [fol. 233] our university community would be a serious detriment to the University of Washington. A University prevented from employing foreign teachers in any field would cut itself off from a good deal of valuable talent (and in some respects unique types of talent), and would tend to become provincial and ingrown as compared with other universities that do not labor under such a restriction.

"Because I got most of my philosophical training in this country, I am not a particularly good example of a teacher who makes a special contribution by virtue of having a foreign background. But the point I am making can be illustrated even by reference to a certain part of my own teaching. I teach a course on existentialist philosophy and have found that a large number of students are particularly interested in the ideas of the Danish philosopher Sören Kierkegaard, who is in my opinion by far the most original and influential exponent of existentialist philosophy. In a course of that type it is of considerable value that the teacher can

read Danish fluently—as few people not brought up in Scandinavia can. In our class discussion today, e.g., we ran into a problem of textual interpretation of an important passage in one of Kierkegaard's works. If I could not check the Danish original, we would have had no way of solving that particular textual problem. In addition to the fact that requirement of the loyalty oath in its present form would impede the proper development of the University of Washington by barring the employment of foreign teachers, the loyalty oath and the disclaimer oath would make it difficult to attract certain able *American* teachers and scholars to positions on the faculty of the University of Washington.

"In addition to my conviction that the loyalty oath in its present form would impede the sound development of the University of Washington by barring the employment of aliens, I find the loyalty oath objectionable on several other grounds.

"The loyalty oath fails to specify *among whom* one should 'by precept and example promote . . . undivided allegiance to the government of the United States'. It is not clear to me whether one would be committed to promote such allegiance (1) among citizen of the United States only, or (2) among citizen *and among alien permanent residents of the United States as well.* I do not see how anybody can reasonably be required to swear (or affirm) to promote, among alien permanent residents, undivided allegiance to the government of the United States. The statement of the oath is therefore in need of clarification on that point.

"I am an active supporter of the United Nations. So my allegiance, not only to the government of Norway, but also to the principals and ideals of the United Nations as an institution prevents me from swearing (or affirming) *undivided* allegiance to the government of the United States.

"I would further like to know whether one according to the loyalty oath is supposed to swear (or affirm) undivided allegiance to the government of the United States in the sense that one must not have an allegiance —or at least not a significant allegiance—to God as the Creator and Governor of the universe.

"I also fail to see what precisely one would be called upon to do, as a university teacher and scholar, in order to promote by precept and example respect for the flag and undivided allegiance to the government of the United States. Would one be committed to exhort his students and colleagues to have such respect and allegiance and would one also be committed to introduce [fol. 234] exhortations of that kind into his scholarly writings? Such efforts would be wasteful and would be irrelevant to one's work as a university teacher and scholar.

"I am perfectly willing to support the constitution and laws of the United States and of the State of Washington, especially because the constitution provides legal means for altering laws and institutions that might be outmoded or detrimental to the general welfare of society. The vast majority of American institutions are in my opinion good, but there are in various parts of the country certain institutions, e.g., institutions promoting racial discrimination, that are socially detrimental and for that reason not worthy of respect. If the loyalty oath means that one is supposed to swear (or affirm) that he will by precept and example promote respect for '*the*' institutions in the sense of *each and every* institution of the United States of America and the state of Washington, the oath would in my opinion by highly unreasonable. If the oath is *not* meant to demand such indiscriminate endorsement of each and every institution of the United States, the statement of the loyalty oath is in need of clarification on that point.

The Disclaimer Oath

"I have never been a member of the Communist Party and am convinced that the theory and practice of Communism are on certain fundamental points completely incompatible with the type of human freedom, civil rights and responsibilities and the democratic institutions to which I am committed. I do, however, find the disclaimer oath objectionable on certain points.

"I fail to see that a person who attempts to 'alter' the Government of the United States by 'revolution' or who knowingly belongs to an organization working for that purpose is necessarily a subversive person and should be disqualified as a teacher. A revolution need not be violent; it might be accomplished by perfectly legal means and might under certain types of circumstances be in the best interest of the country. It is my understanding that the right of revolution is provided by the Declaration of Independence. It might be that the language of the disclaimer oath to the effect that it is 'subversive' to attempt to 'alter' the Government of the United States by 'revolution' is not meant to be opposed to the Declaration of Independence and to those American state constitutions that specifically provide the right of revolution. But because the disclaimer oath is unclear on that important point, I do not see how I could 'certify' that I 'understand' the contents of provisions of RCW 9.81.010 (5) and RCW 9.81.010 (2). In short, unless I am ready to occasion my immediate dismissal from my position at the University of Washington, I must—subject to the penalties of perjury—sign a disclaimer oath which is so formulated that in respect to certain essential points I would by no means be clear as to what I would be committing myself to. It seems to me that such a requirement is unreasonable and incompatible with the fundamental principles of American constitutional democracy.

[fol. 235] *Disputed Facts*

53. The plaintiffs contend as follows:

1. The failure of plaintiffs who are members of the teaching or research faculty of the University of Washington, with or without tenure, to execute Oath forms A or B improperly subjects them to substantial injury in the following particulars:

(a) the risks of unfair prosecution,

(b) deprives them without a hearing of their economic and credit standing and their right to work,

(c) deprives them of their good reputations,

(d) forces them to compromise their good consciences,

(e) their failure to sign carries a built-in inference of disloyalty and/or guilt,

(f) their failure to sign carries a built-in inference of their unfitness as professors.

2. There is no reasonable justification for requiring plaintiffs and others similary situated to execute Oath form A or Oath form B and this requirement will result in substantial injury to plaintiffs and others similarly situated, and through them, to the academic community of the University of Washington as follows:

(a) The intimidation of scholars in that they will inhibit and discourage necessary scholarly associations and the reporting to others of research and experience.

(b) The stifling of inquiry and dissent in that they will inhibit and discourage novel or unconventional undertakings in the several arts and sciences and tend to promote a conformity of thought and opinion.

(c) Making more difficult the University of Washington recruitment of teaching and non-teaching personnel.

(d) The lowering of the prestige and academic standing of the University of Washington with an adverse effect on its general reputation;

and (e) The lowering of the prestige, professional standing, credit standing, and general reputation of persons employed at the University of Washington, and in a position similar to the plaintiffs, with an adverse effect upon them.

[fol. 236] 3. Existing recruitment and personnel procedures at the University of Washington (absent the necessity to execute Oath forms A and B) are adequate to protect the legitimate public interest in securing qualified and trustworthy personnel.

4. Oath form A and Oath form B serve no useful purpose and in fact inflict widespread damage to the University of Washington and to plaintiffs and to those similarly situated.

5. Prospective applicants for academic positions at the University of Washington are reluctant to accept employment there on the condition of executing Oath forms A or B. Thus the University of Washington has difficulty in attracting professors and employees, and so plaintiffs and others similarly situated are deprived of association with and are isolated from scholars and technicians in their respective fields to their detriment and the detriment of the academic community at the University of Washington.

6. The University of Washington and plaintiffs, and others similarly situated, in providing instruction and research into subjects of learning necessarily require as a condition to the satisfactory discharge of the professional duties of the teachers and research staff the widest possible latitude of freedom to inquire, to dispute, to dissent and to associate with others. This very freedom is traditionally granted to universities and to their teachers and students, and it is essential to the proper fulfillment of the function of a university, and to the proper function of plaintiffs and the University of Washington in American society.

7. Neither Oath forms A nor B, if required of citizens or non-citizens employed or seeking employment at the University of Washington, has any reasonable relationship to the qualifications for fitness to teach and will cause great and irreparable damage to the University and to plaintiffs and to others similarly situated because the University and such plaintiffs will thereby be deprived of essential and necessary contact and intercourse with citizens of other nations, outstanding scholars in their fields, who would accept employment at the University of Washington but for the requirement by the University of signing Oath forms A and B.

[fol. 237] 8. Unless defendants are restrained from seeking the execution of Oath forms A or B, plaintiffs and others similarly situated will suffer irreparable injury not compensable in money damages, or by any other means.

9. Plaintiffs who are employees of the University of Washington, or who do not have tenure will be subject to

immediate discharge from employment if they fail to execute Oath forms A or B.

10. Plaintiffs who are employees of the University of Washington having tenure will be subject to immediate discharge from their employment if they fail to execute Oath form A. The hearing afforded them will be a sham inasmuch as its outcome is known in advance because the only question in issue at such hearing is whether a tenured professor, in fact, failed to execute Oath form A.

54. The defendants contend as follows:

1. Deny the facts set forth as contention 1 of plaintiffs above.

2. Deny the facts set forth as contention 2 of plaintiffs above.

3. Deny the facts set forth as contention 3 of plaintiffs above.

4. Deny the facts set forth as contention 4 of plaintiffs above.

5. Deny the facts set forth as contention 5 of plaintiffs above.

6. Deny the facts set forth as contention 6 of plaintiffs above.

7. Deny the facts set forth as contention 7 of plaintiffs above.

8. Deny the facts set forth as contention 8 of plaintiffs above.

9. Deny the facts set forth as contention 9 of plaintiffs above.

10. Deny the facts set forth as contention 10 of plaintiffs above.

These ten issues of fact are stated in the ten contentions of fact as made by plaintiffs above, and the ten denials thereof as made by defendants, and they will not here again be set forth.

Defendants do not agree that all the issues of fact which follow are relevant.

[fol. 238]

Issues of Fact

55. The following are the issues of fact to be determined by the Court herein:

1. Does the failure of plaintiffs, and others similarly situated, who are members of the teaching and research faculty of the University of Washington, with or without tenure, to execute Oath forms A or B improperly inflict damage upon them and subject them to substantial injury in the following particulars:

(a) by subjecting them to the risks of unfair prosecution?

(b) by depriving them without a hearing of their economic and credit standing and their right to work?

(c) by depriving them of their good reputations?

(d) by forcing them to compromise their good conscience?

(e) by tainting them with a built-in inference of disloyalty and/or guilt?

(f) by tainting them with a built-in inference of their unfitness as professors?

2. Do the requirements that plaintiffs, and others similarly situated, who are members of the teaching and research faculty of the University of Washington, with or without tenure, execute Oath forms A or B, result in substantial injury and inflict widespread damage on plaintiffs, others similarly situated, and through them onto the academic community of the University of Washington in the following particulars:

(a) by the intimidation of scholars because the requirement that they execute either Oath form A or B improperly inhibits and discourages necessary scholarly associations and the carrying out and reporting to others of their research and other scholarly experiences?

(b) by stifling inquiry and dissent because the requirement that they execute either Oath form A or B improperly inhibits and discourages novel or unconventional undertakings in research and scholarship into the several arts and sciences and tends to promote an unhealthy conformity of thought?

[fol. 239] (c) by making more difficult the University of Washington recruitment of teaching and non-teaching personnel?

(d) by lowering the prestige and academic standing of the University of Washington because of (e) below, with an adverse effect on its general reputation?

(e) by lowering the prestige, professional standing, credit standing and general reputation of persons employed at the University of Washington, and in a position similar to plaintiffs, with an adverse effect upon them?

3. Do the existing recruitment and personnel procedures at the University of Washington (absent the necessity to execute Oath forms A or B) adequately protect the legitimate public interest in securing qualified and trustworthy personnel?

4. Do the requirements that as a condition of their employment prospective applicants for academic or research employment at the University of Washington execute either Oath form A or B discourage said applicants from applying and/or accepting employment at the University of Washington and serve thereby improperly to deprive plaintiffs, and others similarly situated, of valuable associations with, and become isolated from, essential and needed contact and intercourse in their various professional fields with scholars and technicians who are citizens or non-citizens to their irreparable damage and through them to the academic community of the University of Washington?

5. Do plaintiffs, others similarly situated, and through them the academic community of the University of Washington, when providing instruction and research into subjects of learning, necessarily require as a condition to the satisfactory discharge of their professional duties as

scholars and researchers, the widest possible latitude of freedom to inquire, to dispute, to dissent and to associate with others?

6. Does Oath forms A or B, as a condition of employment of either citizens or non-citizens, or those employed or seeking employment at the University of Washington, improperly burden and/or exhibit no proper relationship [fol. 240] to the qualifications for fitness to teach or carry out research in the several arts and sciences?

7. Will plaintiffs, others similarly situated, and through them the academic community of the University of Washington suffer irreparable damage not compensable in monetary term, or by any other means, unless defendants are restrained from seeking the execution of Oath forms A or B from them?

8. Does failure to execute Oath forms A or B by non-tenured employees of the University of Washington subject them to immediate discharge from their employment?

9. Does failure to execute Oath form A by tenured plaintiffs, and others similarly situated, subject them to immediate discharge from their employment because the hearing afforded them will be a sham inasmuch as its outcome is known in advance because the only question in issue is whether a tenured person failed to execute Oath form A?

10. Does either Oath form A or B interfere with plaintiff's free exercise of academic liberty, or political expression, or association?

[fol. 241]

Issues of Law

56. The following are the issues of law to be determined by the Court:

1. Do the provisions of Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, which require plaintiffs as a condition precedent to their continued employment, to execute the oaths required by either or both of the foregoing statutes constitute an abridgement of their rights, privileges, and immunities as

secured and guaranteed to them by Article I, Section 10 and the First, Fifth, and Fourteenth Amendments to the Constitution of the United States?

2. Do the provisions of Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, requiring the execution of one or both of the oaths called for in the foregoing statutes as a condition to the favorable acceptance of applications for employment by the University of Washington of persons similarly situated to plaintiffs constitute an abridgement of the rights, privileges and immunities of plaintiffs, and others similarly situated, as guaranteed and secured by Article I, Section 10 and the First, Fifth and Fourteenth Amendments of the Constitution of the United States?

3. Do the dismissal procedures of all non-tenured plaintiffs and other similarly situated as required by the memorandum from President Odegaard dated May 28, 1962, and/or Chapter 103, Laws of Washington, 1931, upon a failure of such persons to execute Oath forms A and B, operate in a summary and automatic manner and thereby constitute arbitrary and capricious state action forbidden by the First, Fifth and Fourteenth Amendments to the Constitution of the United States because Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, as thus interpreted:

(a) Operate in a vague and indefinite standard, which does not afford plaintiffs or other University of Washington employees,

1. a reasonable notice of charges;

2. the right to a hearing;

[fol. 242] 3. an opportunity to cross-examine witnesses supporting the charges;

4. an opportunity to offer evidence on one's own behalf;

5. the right to be represented by counsel.

4. Do the provisions of Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, commanding plaintiffs to sign the oaths required by the foregoing statutes violate the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and are such statutes arbitrary and discriminatory and in derogation of the rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States to plaintiffs and to others similarly situated, inasmuch as the terms and wording of said required oaths:

(a) Are so fluid and vague that men of ordinary intelligence must necessarily guess as to their meaning and differ as to their application;

(b) Require all plaintiffs and other similarly situated to speculate as to penal laws which might be applied to them, thus deterring constitutionally protected conduct and subjecting them to a substantial risk of unfair prosecution if the oaths are not signed;

(c) Will inhibit, deprive and abridge the rights of plaintiffs and others similarly situated to the exercise of rights to freedom of speech, freedom of association and religious freedom constitutionally protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

(d) Require a declaration of belief in terms which are vague and indefinite.

(e) Necessarily require plaintiffs, and others similarly situated, to offer testimony against themselves.

5. Do the provisions of Chapter 103, Laws of Washington, 1931, demanding the oath there set forth deny and thus violate rights of freedom of speech, belief and association, freedom of religion and its exercise, and freedom from self-incrimination, secured to plaintiffs and to others similarly situated by the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

6. Do the provisions of Chapter 377, Laws of Washington, 1955, amending Chapter 254, Laws of 1951 constitute

a prior restraint on either freedom of speech or association, or both, or upon academic liberty and freedom as [fol. 243] these rights are individually secured and guaranteed to plaintiffs and others similarly situated by the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

7. Do the provisions of Chapter 103, Laws of Washington, 1931 and Chapter 377, Laws of Washington, 1955, and Oath Forms A and B constitute bills of attainder and an impairment of the obligations of contract in violation of Article I, Section 10 of the United States Constitution?

8. Do Oath forms A and B as applied to plaintiffs in the various classes, unreasonably abridge freedom of inquiry, communication and dissent, attributes and qualities which are a part of freedom of speech and association necessary to a university community?

9. Do Oath forms A and B unreasonably interfere with the contractual duty of plaintiffs who are teachers, to furnish the education under which they have a contractual duty to provide?

10. Does an actual controversy exist between the plaintiffs and others similarly situated, and the defendants?

11. Do the provisions of Chapter 103, Laws of Washington, 1931, amount to a restraint on conscience and a coercion of belief contrary to the safeguards of the First Amendment to the Constitution of the United States?

12. Do the dismissal procedures of tenured employees, and others similarly situated, as required by the memorandum from President Odegaard dated May 28, 1962, and/or Chapter 103, Laws of Washington, 1931, upon the failure of such persons to execute Oath form A, operate in a summary and automatic manner and thereby constitute arbitrary and capricious state action forbedden by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America?

[fol. 244] *Expert Witnesses*

There shall be no expert witnesses on behalf of plaintiffs or defendants, to testify in person or by deposition at trial. This fact and procedure expressly having been agreed upon by plaintiffs and defendants.

[fol. 245] *Other Witnesses*

The names of witnesses, other than experts, to be used by each party at the time of trial are:

(a) on behalf of plaintiffs:

1. Z. William Birnbaum (by deposition)
14620 Southeast 55th
Bellevue, Washington

(b) on behalf of defendants:

1. no witnesses either direct or rebuttal.

Other than the deposition of Z. William Birnbaum, noted immediately above, and the statements under *Facts Not To Be Contested* which are to be admitted into evidence and the makers of which shall not be called upon to testify further, there shall be no other witnesses at trial on behalf of plaintiffs or defendants, whether for purposes of direct examination and testimony or for rebuttal. This fact and procedure expressly having been agreed upon by plaintiffs and defendants.

[fol. 246] *Exhibits*

(a) The exhibits below listed were produced and marked and may be received into evidence without objection:

(1) *Plaintiff's exhibits:*

1. Oath Form A—Statement and Oath for Teaching Faculty of the University of Washington.

2. Oath Form B—Statement and Oath for Staff of the University of Washington Other than Teaching Faculty.

3. The Faculty Handbook, Parts I, II, and IV, pertinent provisions being found in Chapters 12, 13, 23, 24, 25 and 26.

4. The Faculty Handbook, Volume II (Supplement to the 1956 Faculty Handbook), pertinent provisions being found in Chapters 1, 2, 3 (Part C, Section 4).

5. Statutes, By-Laws and Standing Orders Affecting the Board of Regents, University of Washington, February 1958, Revised March 18, 1960.

6. Memorandum to the Deans from President, Charles E. Odegaard, on the subject of documentation for recommendations for Promotions of Tenure, dated February 6, 1959.

7. Inaugural Address of Charles E. Odegaard, President, University of Washington, delivered on November 7, 1958 in Seattle, Washington.

8. A copy of the letter dated January 23, 1962, from Solomon Katz, Dean of the College of Arts and Sciences, to Professor Walter Watson.

9. A copy of the letter, dated January 30, 1962, from Robert E. L. Faris, Executive Officer, Department of Sociology, to Professor Walter Watson.

10. Memorandum dated June 14, 1962, to all faculty, graduate assistants, and staff of the Department of Mathematics from Carl B. Allendoerfer, Chairman of that department.

[fol. 247] 11. A copy of the letter dated June 5, 1962, to Solomon Katz, Dean of the College of Arts and Sciences from Professor Ronald Geballe, Chairman Department of Physics.

12. A copy of the letter dated June 4, 1962, to Solomon Katz, Dean of the College of Arts and Sciences from Professor Kenneth E. Read, Chairman Department of Anthropology.

13. A copy of the letter dated June 6, 1962, to Kenneth Read, Chairman Department of Anthropology from Solomon Katz, Dean, College of Arts and Sciences.

14. A diagrammatic presentation of the structure of several statutes of the State of Washington which are in issue in this cause.

15. A copy of the letter dated December 18, 1961 to William B. Woolf from Carl B. Allendoerfer, Executive Officer, Department of Mathematics.

16. A copy of the affidavit executed June 19, 1962, by Mrs. Jean Ashford, Acting Librarian of the Health Sciences Library of the University of Washington.

17. A copy of the affidavit executed by Arthur F. Smullyan, Professor and Executive Officer of the Department of Philosophy at the University of Washington.

(2) *Defendant's exhibits:*

1. House Concurrent Resolution No. 10, Laws of 1947, p. 1378.

2. First Report, Un-American Activities In Washington State, 1948.

3. Second Report, Un-American Activities In Washington State, 1948.

4. Report of Un-American Activities Committee To The Thirty-first Legislature of the State of Washington (House Journal, 1949, p. 1095).

There shall be no additional exhibits other than those enumerated above. This fact and procedure expressly having been agreed upon by plaintiffs and defendants.

[fol. 248] *Miscellaneous*

I. Plaintiff, Z. William Birnbaum, was deposed on Thursday, July 5, 1962, at the hour of two o'clock, thereof, at the Hoge Building, Seattle, King County, Washington, before Louis R. Guevara, a notary public in and for the State of Washington. Said deposition has been filed with the court. Appearances of counsel for plaintiffs were Attorneys at Law, Arval Morris and Byron D. Coney. Appearances of counsel for defendants were Herbert H. Fuller, Deputy Attorney General for the State of Washington and Ernest M. Furnia, Assistant Attorney General for the State of Washington. This deposition taken of Z. William Birnbaum is attached to and is made a part of this

order and incorporated throughout; it being expressly agreed upon by plaintiffs and defendants that said deposition be admitted into evidence in its entirety and that they hereby waive any and all objections which were, or could have been, made at the time of taking this deposition, and also all objections which could be made in the future, at trial or at any other time, whether said objections would go to the form of the questions asked, the admissibility of the testimony, or to any other matter; excepting however, that counsel for defendants cannot, and do not, concede the truth of the matters testified to by Z. William Birnbaum, nor do counsel for defendants concede the probative value of his testimony in determining any of the issues in this case, but said counsel do not intend to contest his testimony at trial with evidence to the contrary.

2. Plaintiffs and defendants waive any and all objections either may have, in any way, going to any and all matters regarding pre-trial conferences heretofore held in this cause, including each and every aspect of this order, and/or its execution. This fact and procedure expressly having been agreed upon by plaintiffs and defendants.

[fol. 249] *Action by the Court*

The Court has ruled that:

(a) Trial briefs shall be submitted to the Court on or before August 23, 1962, and briefs in reply thereto, if any, on or before August 30, 1962.

(b) The deposition of Z. William Birnbaum, noted above, be, and hereby is, admitted into evidence. The same need not be read at time of trial.

(c) On motions to dismiss this action heretofore made by defendants, the following decisions and memorandum opinion be entered:

Memorandum Opinion on Motion to Dismiss

This matter is before the court upon an order to show cause why a temporary restraining order heretofore issued

should not be continued in effect as a preliminary and interlocutory injunction pending trial of this action and also upon defendants' motion to dismiss upon the following grounds:

1. To dismiss the action as to plaintiffs, Rocky Bauer, Jay Patrick Donaley, Roberta Milowe, and Wayne C. Muller, on the ground that they lack standing to challenge the validity of the oath requirement statute (Chapter 254, Laws of 1951, as amended, Chapter 377, Laws of 1955, RCW 9.81), inasmuch as they are not "public officials" or "employees" of the State of Washington within the meaning of that statute, but students attending the University of Washington; nor are they "teachers" under Chap. 103, Laws of 1931.

2. To dismiss the action as to all plaintiffs on the ground that it is premature and presents no real controversy in that there has been no showing that plaintiffs have refused to sign the oath in question.

3. To dismiss the action as to all plaintiffs on the ground that the court lacks jurisdiction because no substantial Federal question is presented by the complaint.

4. To dismiss the action as to all plaintiffs because the complaint fails to state a claim against defendants upon which relief can be granted.

Defendants, in argument, have indicated that the third ground given for their motion, namely, that the court lacks [fol. 250] jurisdiction because no substantial federal question is presented, will not be pursued, may be considered as stricken.

The Court having examined the complaint and the amendment thereto and considered the briefs and arguments of counsel, is of the opinion that the substantial claims and issues presented herein were decided in *Nostrand* v. *Balmer*, 53 Wn. 2d 460, 335 P. 2d 10; *Nostrand* v. *Little*, 58 Wn. 2d 111, 361 P. 2d 551, and *Nostrand* v. *Little*, 368 U.S. 436. It appears doubtful that plaintiffs can prevail after a hearing on the merits in view of *Nelson* v. *County of Los Angeles*, 362 U.S. 1; *Lerner* v. *Casey*, 357 U.S. 468; *Beilan* v. *Bd. of Education*, 357 U.S. 399; *Adler* v. *Board of Educa-*

tion, 342 U.S. 485; *Garner* v. *Los Angeles Board,* 341 U.S. 716.

However, in this action Professors Nostrand and Savelle have joined with additional parties, including non-tenured teachers, non-teaching employees of the University of Washington, and others, and have raised additional though tenuous issues which merit full consideration.

It is our view that the motion to dismiss should be denied except as to the first ground. The motion to dismiss the action as to plaintiffs, Rocky Bauer, Jay Patrick Donaley, Roberta Milowe and Wayne C. Muller, on the ground that they lack standing to challenge the validity of the oath-requirement statutes involved herein is well taken. These student-plaintiffs have no direct legal interest in the requirement imposed on the teaching personnel and other employees of the University that, as a condition of their employment, such employees must sign a statutorily-prescribed oath. Students are not required to subscribe to the oath.

The possibility of some future change in the quality or character of the education offered by the University of Washington, such as plaintiffs fear might result by reason of the oath requirement, is too contingent and remote to affect the legal interests of these student plaintiffs.

Applying established criteria for the determination of standing to litigate an issue the facts alleged do not show that the above-named student plaintiffs have sustained, or are immediately threatened with, any such definite and [fol. 251] actual injury as would establish the existence of a justiciable controversy between them and the defendants. See *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227; *Frothingham* v. *Mellon,* 262 U.S. 447; *Joint-Anti-Fascist Refugee Committee* v. *McGrath,* 351 U.S. 123.

The action will be dismissed as to plaintiffs, Rocky Bauer, Jay Patrick Donaley, Roberta Milowe, and Wayne C. Muller, and an order so providing may be presented.

With respect to the continuation of the restraining order as a temporary injunction counsel for defendants has stated in argument his view that in the event the motion to dismiss is denied the defendants would not resist the imposition of a temporary injunction pending trial, and it may be so ordered.

Defendants may have ten days within which to file their answer and the case is set for pretrial conference on August 6, 1962 at 1:30 o'clock, p.m., with trial on the merits set for Thursday, August 30, 1962, at 9:30 o'clock, a.m.

Dated this 13th day of July, 1962.

Gilbert H. Jertberg, United States Circuit Judge,
William J. Lindberg, United States District Judge,
William T. Beeks, United States District Judge.

(d) The motion to dismiss be and the same is hereby denied except as to the sole ground set forth above. It is therefore ordered that plaintiffs Rocky Bauer, Jay Patrick Donaley, Roberta Milowe and Wayne C. Muller be, and they hereby are, dismissed with prejudice.

(e) The heretofore issued preliminary and interlocutory injunction pending trial of this action be and hereby is continued and be, and hereby is, made a temporary injunction pending trial of this cause.

[fol. 252] The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signature of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated this 30th day of August, 1962.

Gilbert H. Jertberg, United States Circuit Judge,
William J. Lindberg, United States District Judge,
William T. Beeks, United States District Judge.

Form Approved:

Arval Morris, Attorney for Plaintiffs; Byron D. Coney, Attorney for Plaintiffs; Kenneth A. MacDonald, Attorney for Plaintiffs.

Herbert M. Fuller, Dep. Atty. Gen., of Attorneys for Defendants.

[fol. 253] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

LAWRENCE W. BAGGETT, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, Plaintiffs,

vs.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ALBERT MURPHY, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, Defendants.

MEMORANDUM OPINION—February 9, 1963

Before Jertberg, Circuit Judge, and Lindberg and Beeks, District Judges.

LINDBERG, District Judge:

This is a class action in which sixty plaintiffs employed at the University of Washington in both teaching and non-teaching positions seek declaratory and injunctive relief against the enforcement of two Washington statutes by defendants, the President of the University, the members of the Board of Regents, and the Attorney General of the State of Washington. The statutes under attack are Chapter [fol. 254] 377, Laws of 1955, amending the Subversive Activities Act of Washington, Chapter 254, Laws of 1951, herein sometimes referred to as the "loyalty oath" statute; and Chapter 103, Laws of 1931, herein sometimes referred to as the "oath of allegiance" statute.

It is alleged that, as applied to plaintiffs, these statutes are violative of Article 1, Section 10 and the First, Fifth, and Fourteenth Amendments of the Constitution of the United States. The court is asked to declare these statutes unconstitutional and to issue a permanent injunction against their enforcement.

Upon the filing of the complaint a three-judge district court was convened pursuant to the mandate of 28 U.S.C., §§ 2281 and 2284, and on July 13, 1962 heard arguments on plaintiffs' motion for an interlocutory injunction and defendants' motion to dismiss. The motion to dismiss was denied and a temporary injunction was issued pending a full hearing on the merits.

Pretrial conferences were held and an extensive pretrial order, approved by all parties, has been entered, containing a number of stipulations of fact relating to the events, the background, and academic setting of the controversy. Pursuant to stipulation by the parties no oral testimony was presented but statements of several persons were set forth in the pretrial order and a number of exhibits were admitted without objection. The issues of law have been carefully and extensively briefed and orally argued by counsel. This court has jurisdiction under 28 U.S.C., §§ 1331 and

1343(3), and 42 U.S.C., § 1983, relating to alleged deprivation of civil rights under color of state law.

[fol. 255] *Background of the Case*

Both of the Washington statutes involved require the taking of an oath by employees of the State of Washington. Although the oath of allegiance is required of teachers only, the 1955 statute, which is an amendment to the Subversive Activities Act,[1] provides that every employee of the State of Washington must state under oath whether or not he or she is a member of the Communist party or other subversive organization, and that refusal to answer on any ground shall be cause for immediate termination of such employee's employment or refusal to accept his or her application for employment. The terms "subversive person", "subversive organization" and "foreign subversive organization" as used in the Act are defined therein and the Communist party is declared to be a subversive organization.

While the oath of allegiance statute has not previously been attacked the loyalty oath statute has been the subject of prior litigation[2] commenced in the Superior Court of the State of Washington by Howard Nostrand and Max Savelle, tenured professors at the University of Washington, who are also plaintiffs in the instant case. The Supreme Court of Washington upheld the constitutionality of Chapter 377, Laws of 1955 against attack under both state and federal constitutions, with the exception of one section not here relevant, which section was declared to unconstitutional but severable. On appeal to the United States Supreme Court that court vacated the decision of the Supreme Court of Washington and remanded the case for a determination whether state employees who refused to sign the oath would be entitled to a hearing at which the refusal to sign the oath could be explained or defended. On the re-[fol. 256] mand the Washington court held that the statutes requiring the loyalty oath did not afford such a hearing but that professors Nostrand and Savelle, as tenured professors, would be entitled to such a hearing pursuant to the terms of their employment contract and under the rules promulgated by the Board of Regents in accordance with their statutory authority. An appeal was again taken to

the United States Supreme Court which, in a *per curiam* decision handed down January 22, 1962, granted the Attorney General's motion to dismiss "for want of a substantial federal question." Whereupon the injunction staying enforcement of the loyalty oath statute, which had been in effect since 1955, was dissolved.

Thereafter, in a memorandum issued on May 28, 1962 by President Odegaard pursuant to directions from the Board of Regents, notice was given to all University employees that they would be required to sign an oath which would fulfill the requirements of the Washington Subversive Activities Act, and October 1, 1962 was set as the final date for execution of such oath. Printed forms of an oath in the following language, which differs from that involved in the prior litigation, have been distributed to employees of the University:

> "I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and
>
> "I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
>
> "I understand that this statement and oath are made subject to the penalties of perjury." (Exhibit #2)

[fol. 257] The sections of the statute referred to in the oath are printed on the reverse side of the oath form as set forth in the footnotes.[3]

The oath of allegiance for teachers is prescribed by Section 1 of Chapter 103, Laws of 1931[4] and Section 2 of said Chapter,[5] states that every professor, instructor or teacher employed by any state institution of higher learning or any school supported in whole or in part by public funds shall subscribe to the oath or affirmation required of all public school teachers before entering upon the discharge of his duties.

The President and Board of Regents of the University of Washington have given notice to all teaching personnel

that they are required to subscribe to the oath of allegiance in addition to the loyalty oath. It is not disputed that defendants intend to exact compliance with the provisions of both oath statutes; that they have taken administrative steps to effect such compliance; and have given notice to all members of the University staff that in the event of failure of an employee to comply by subscribing to the oath or oaths required of him by October 1, 1962, "employment will be terminated 30 days later as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign."[6] Nor is it disputed that all plaintiffs have refused to sign the oaths required of them, alleging that the statutes are violative of their rights under the United States Constitution. We therefore find that a justiciable controversy exists as to which this court has jurisdiction. *Bell* v. *Hood*, 327 U. S. 678.

Most of the plaintiffs, including three tenured professors who are aliens, are members of the teaching faculty and [fol. 258] are required by the Washington statutes to subscribe to both the loyalty oath and the oath of allegiance. Non-teaching employees are required to sign only the loyalty oath. Some of the plaintiffs are research associates of various ranks—one is a micrometeorologist, another is an assistant editor of the University of Washington Press, two are employed as secretary-typists, and another is a detailer in the cyclotron department. All plaintiffs are suing both for themselves and for others similarly situated.

Contentions

The basic claims of plaintiffs are as follows:

1. That the statutory requirements of oath-taking as a condition of employment by the state are unjustifiable invasions of rights of freedom of speech, belief, and association, and freedom of religion, all as protected by the First and Fourteenth Amendments to the Constitution of the United States.

2. That the oath requirements operate as a prior restraint upon free speech and free association and are destructive of academic liberty.

3. That the language of the oaths is vague and uncertain.

4. That the statutes violate the Fifth Amendment privilege against self-incrimination; and that the requirement of a positive act of oath-taking, on pain of loss of employment, unconstitutionally shifts the burden of proof on the question whether they are subversive persons.

5. That the statutes and administrative action contemplated thereunder provide for summary and automatic discharge on grounds unrelated to fitness for employment [fol. 259] and would deprive non-tenured employees of reputation and property rights without the protections of procedural due process, and are therefore an arbitrary and discriminatory exercise of state power.

6. That the 1955 loyalty oath statute is a bill of attainder.

7. Invoking the supremacy clause, plaintiffs argue that these statutes deal with sedition, a subject pre-empted by the Congress, under the holding of *Pennsylvania* v. *Nelson*, 350 U. S. 497. Plaintiffs further claim that the oath of allegiance statute interferes with the conduct of foreign relations in that it sets a condition for employment as a teacher in the state university which, in effect, excludes foreign scholars from teaching at the university.

Other arguments are addressed to the wisdom of the legislation and will not be discussed.

Defendants, on the other hand, contend that it is within the power of the State of Washington to require a loyalty oath as a condition of employment by the state for the purpose of safeguarding the state from disloyalty; and to prescribe the taking of an oath of allegiance as a qualification for fitness to teach. They deny that the oath requirements invade any constitutionally-protected rights of plaintiffs, deny that the oaths are vague and uncertain, and argue that it is not apparent in the present context of events that any employee will be denied procedural due process in any future proceeding for termination of employment for failure to subscribe to the required oath or oaths.

Discussion

We wish to emphasize at the outset that this is a declaratory judgment action. Enforcement of the statutes by [fol. 260] University officials, while clearly intended, is still prospective as a result of this litigation. The court granted a temporary restraining order on June 25, 1962. With the acquiescence of the defendants the restraining order was continued as a temporary injunction pending trial and is still in effect, pending the decision of the court. Consequently, although the date of October 1, 1962, set as the deadline date for University employees to subscribe to the oath, has come and gone, none of the plaintiffs has been dismissed for refusal to sign the oath or oaths. Thus the dismissal policies and hearing procedures which would actually be put into effect by the University administration are not known, which causes the "due process" issues to be speculative and difficult of resolution. The principal questions, however, must necessarily relate to the validity of the statutes as construed on their face and in the light of surrounding circumstances, and to these issues we direct our primary attention.

Plaintiffs have elected to treat the two oath statutes together in large part. In view of the conclusions we have reached we shall consider the statutes separately. All of the contentions of the parties which merit consideration will be treated in the course of discussion of the issues raised as to each statute.

The Loyalty Oath Statute

In considering the provisions of the 1955 amendment to the 1951 Subversive Activities Act, which form the basis for the loyalty oath requirement, we are not concerned with the effectiveness or the wisdom of loyalty oaths. We perceive the truth of the remark of Justice Black, concurring in *Speiser* v. *Randall*, 357 U. S. 513, 532:

> [fol. 261] "I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty oaths'; loyalty must arise spontaneously from the hearts of people who love their country and respect their government."

But questions of wisdom and effectiveness are matters of legislative and not judicial concern.

Was the legislation within the power of the Washington legislative body to enact? It cannot be questioned that a state has power to safeguard the public service from disloyalty;[7] and the right of the state to inquire of its employees concerning their loyalty has been recognized in a number of cases.[8] A statute enacted for such a purpose "comes to us encased in the armor wrought by prior legislative deliberation," [9] and we are mindful of "the deference due to legislative determination of the need for restriction upon particular forms of conduct." [10]

The 1951 statute was enacted by the legislature pursuant to executive request following a report of a joint fact-finding committee of the Washington legislature investigating un-American activities in the State of Washington.[11] It must be presumed that legislative findings sufficient to justify the enactment of the 1951 statute were made, and that the 1955 amendment was supported by the same findings. We are therefore unable to accept plaintiffs' argument that there has been no showing of a public danger sufficient to justify the enactment of restrictive legislation.

The loyalty oath is required of every state employee or applicant for state employment. But plaintiffs argue vehemently that loyalty oaths may not be required of academic personnel of a university; that such a condition is "utterly inconsistent" with the necessities of their role in the aca- [fol. 262] demic community as discoverers and transmitters of knowledge and truth; in effect, that they stand in a category apart. We cannot agree that members of state institutions of higher learning are constitutionally immune from inquiry into matters within the legitimate legislative concern, in the public interest.[12]

The next question is whether there is a rational relationship between the condition imposed by the statute and the particular public service rendered by those plaintiffs whose duties are of an academic nature. The essentiality of the preservation of universities as centers of thought, research and teaching can never be doubted. Nor can we overemphasize the absolute necessity of academic freedom as a

vital force, both in the effective functioning of these great educational institutions and in the maintenance of our democratic society.[13] Teaching and research personnel must do their work in an atmosphere of free inquiry, free of external restraints on thought, and equally free of secret restraints on their individual intellects. Academic freedom of inquiry and the fearless pursuit of truth and knowledge, wherever they may lead, is not possible for an individual who is fettered by dedicated membership in an association whose purpose is violent overthrow or destruction of our constitutional form of government, the very guardian of our rights and freedoms. Such an individual is incapable of fearless and untrammelled inquiry and creative thought because he is bound by a rigid adherence to an ideology governed by the political expediencies of its revolutionary purpose rather than by dedication to the verities wherever they may be discovered. Academic personnel should be unfettered by the restraints on free thought which such an association imposes if they are to effectively perform their [fol. 263] duties in the academic world. Education, not indoctrination, is the function of a university teacher.

The legislative declaration that one who is under the discipline of membership in a subversive organization, as defined in the statute, is unfit for a position of trust in the public service[14] is supported by reason and experience, and is most poignantly applicable to positions of trust in a state university, where an absence of both institutional and associational restraint on free thought and inquiry is of the essence of effective service. It is unnecessary to dwell at length on the influence exerted by university teachers in the molding and development of young minds. It is well recognized that inquiry into the moral and intellectual fitness of a teacher is relevant to the question of his fitness to teach.[15] We cannot say that application of the loyalty oath provisions to academic personnel of a state university is without rational relationship to the purposes of the entire legislative enactment, which was within the power of the State of Washington to enact.

May the desired information be elicited by use of a form of disclaimer oath as a substitute for individual inquiry

of each employee? We think it may, if the oath is sufficiently limited[16] to the area of legitimate state concern. In an institution as large as the University of Washington, to conduct personal interviews of all present and prospective employees concerning their loyalty would be administratively burdensome and might be subject to abuses. In lieu of such inquiry the university officials have elected to require a sworn statement, narrowly limited to the precise matters of legitimate state concern. So limited, the oath serves the same purpose as individual inquiry.

[fol. 264] But plaintiffs assert that the requirement that they sign the form of oath presented to them, in the language in which it is couched, unjustifiably invades their First Amendment freedoms of speech, belief and association, and will tend to discourage the exercise of constitutionally-protected rights of association and exchange of ideas, incidentally impairing their performance of their academic function. Such rights, whether in relation to academic liberty or otherwise, are to be accorded a high degree of constitutional protection, but they are not "absolutes." It is sometimes necessary to reconcile these constitutional protections against the exercise of valid governmental powers by a "balancing" of the interests involved.[17] Recent cases have made clear that a substantial invasion of such rights may not be justified by reliance on a state's right to inquire into the fitness and competency of teachers.[18] But we find no such invasion of constitutional rights by the statute and oath in question here. A careful consideration of the language of the oath confirms the impression left by a cursory reading; namely, that the oath does not require any statement as to the political, religious, economic or social beliefs of the person subscribing thereto, nor does it require him to refrain from membership in any kind of association whatever, *except* those associations which have an aim or purpose to overthrow, destroy or alter the constitution and government of the state or nation by revolution, force or violence.

The employee is not asked to reveal all his associational ties, past and present, as in *Shelton* v. *Tucker*;[19] nor is he asked, as in *Cramp* v. *Board of Public Instruction*,[20] to

swear that he has not "in the unending past ever knowingly lent (his) 'aid' or 'support', or 'advice' or 'counsel' [fol. 265] or 'influence' to the Communist party;" nor is he asked, as in *Sweezy* v. *New Hampshire*,[21] to make statements about matters of private conscience which are not clearly included within the scope of legislative concern. Plaintiffs' reliance on these cases is misplaced. In all three the requirement on which employment was conditioned is distinguishable from the condition here imposed. Plaintiffs here are simply required to state that they do not now and will not in the future engage in the proscribed subversive conduct nor become or remain a member of a subversive organization as defined in the statute. The Washington statute is not concerned with past membership, and the Washington court has held that the element of scienter is implied in every clause of the pertinent statutory provisions.[22] If denial of state employment to a "subversive" person, as defined in the statute, constitutes any invasion of constitutional rights of speech and association, the restriction certainly goes no further than may be justified, under "balancing" principles, by the state's interest in self preservation and in the qualifications and fitness of its employees.[23]

Plaintiffs further assert that the loyalty oath requirement operates as a prior restraint upon free speech and association and is destructive of academic liberty. This contention is bound up with the further argument that the structure and language of the oath is vague, leaving plaintiffs uncertain of the sweep of the statute and the kind of conduct or association which will disqualify an individual from public employment. Plaintiffs, relying on *Cramp*, *supra*, voice apprehension that at some future time, as a result of alleged vagueness, conduct and association which is nonconforming or which finds disfavor in the prevailing [fol. 266] community sentiment, will be found to be "subversive" under the terms of the statute. It is our view that a reasonable construction of the statutory language does not leave the meaning uncertain or vague—in any event not to the extent that the statute must or should be held unconstitutional in an action such as this. The words used

are to be understood in accordance with the ordinary meaning of the words in current usage.

Plaintiffs have singled out the words "abet", "assist", and "by any means" for criticism on the score of vagueness. According to Webster's New International Dictionary, 2nd edition, the ordinary meaning of those words in current usage is:

> "abet . . . To incite, encourage, instigate, or countenance;—now used chiefly in a bad or a disparaging sense; as, to abet the commission of a crime."
>
> "assist . . . To lend aid; to help."
>
> "by any means . . . . In any way; possibly; at all."

With these definitions in mind the meaning of "abet", "assist" and "by any means", as used in the statute, is free of ambiguity. It is not unreasonable to ask an employee to state that he "understands and is familiar with" the contents of the statutory provisions printed on the reverse side of the form. It is only necessary that he understand the concepts reasonably and ordinarily conveyed by the language. He is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed.

Plaintiffs also seize upon the words "alter" and "revolution" and argue that their inclusion in the statute must mean that public employees may not engage in conduct or association which seeks, by peaceful and lawful means, to [fol. 267] effect a radical change in the governmental structure. To find such a legislative intent in the statute would be unreasonable in view of the provisions in both state and federal constitutions for amendments to our constitutional form of government. It is not difficult to ascribe a strained interpretation to a statute if one is dissecting it with a view to the establishment of its invalidity, but sound principles of statutory construction require that the provisions of a statute be interpreted in a manner consistent with the intent and purpose of the entire enactment and the usual meaning of the language in the context in which it is employed. In context, it is clear that "revolution" as used does not refer to a peaceful change of a revolutionary nature.

It is to be construed along with the accompanying words "by . . . force or violence" and refers to forceful or violent revolution,[24] which has been the usual historical meaning of the word "revolution" when used in a political context. As so construed, the inclusion of the word "revolution" is admittedly redundant, but the fact of such redundancy will not sustain an argument that the legislature intended by the mere insertion of that word to fundamentally enlarge and change the whole scope and intent of the enactment in disregard of the established concepts of constitutional amendment or change by peaceful and lawful means. To state such an interpretation is to reveal its absurdity.

Similarly, the words "force or violence" as used in the statute clearly modify and relate back to the antecedent verb and noun, "alter" and "alteration," just as they modify the other verbs and nouns in the series of which they are a part; viz:

> [fol. 268] "any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction, or alteration of . . . the constitutional form of the government . . . by . . . force or violence."

It has not been shown that upon subscribing to the "disclaimer" oath plaintiffs will thereby experience any stifling of their freedom of inquiry, criticism and dissent, nor that their academic freedom will be impaired. Without questioning the sincerity of plaintiffs' fears that public hysteria or the temper of the times might conceivably at some future time bring about such a result we are unable in this declaratory judgment action to find any substantiation for such fears, on the face of the statute, or in the facts of record or within judicial knowledge. It is our conclusion that Chapter 377, Laws of Washington, 1955, does not constitute a prior restraint on First Amendment freedoms; nor are we constrained to find its language to be vague and uncertain.

As to alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales* v. *United States*[25] and *Noto* v. *United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a sub-

versive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination,[28] or lack of frankness and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecu- [fol. 269] tion. Different standards are applicable, and Smith Act cases are not in point.

A further argument made against the validity of the loyalty oath statute is that it infringes upon the privilege against self-incrimination. There is no merit in this argument. The statutory requirement that government employees must answer relevant questions by written statement if they wish to establish their eligibility for employment does not require plaintiffs to give testimony against themselves. The absence of any inquiry into past conduct and the implied inclusion of the element of scienter negate the potential danger of self-incrimination. The statements in *Cramp, supra,* on which plaintiffs rely, were made in reference to an oath in language found to be unconstitutionally vague and are not applicable here.

Relying primarily on *Speiser* v. *Randall*,[30] plaintiffs further argue that the loyalty oath requirement is an unconstitutional shifting of the burden of proof in regard to the loyalty of a government employee. However, in *Konigsberg* v. *State Bar Association*,[31] the United States Supreme Court pointed out that there is a distinction between statutes penalizing or controlling free speech—like the statute found unconstitutional in *Speiser*—and those statutes "merely denying access to positions where unfitness may lead to abuse of state-given powers or privileges."[32] In *Speiser*, the court distinguished such cases as *Garner* v. *Board of Public Works*, 341 U. S. 716, *Gerende* v. *Board of Supervisors*, 341 U. S. 56, and *American Communications Assn.* v. *Douds*, 339 U. S. 382, in that the purpose of the statutes there involved was to protect "some interest clearly within the sphere of governmental concern" from an evil "suffi-

ciently grave to justify limited infringement of political [fol. 270] rights."[33] We think the statute here involved, insofar as it affects these plaintiffs, is similarly distinguishable. *Speiser* is therefore not controlling.

The pre-emption argument based on *Pennsylvania* v. *Nelson*,[34] need not detain us long, on these facts. The court's opinion in *Uphaus* v. *Wyman*,[35] indicates that *Nelson* did not strip the states of the right to guard their own security and a state may legitimately make inquiry and investigate in this area.

The contention that the loyalty oath statute is a bill of attainder was argued and disposed of in the course of the prior litigation and merits no discussion here. See also *Garner* v. *Board of Public Works*, *supra*, at page 722.

As in the prior litigation arising out of this statute, the question whether or not an employee who refuses to subscribe to the loyalty oath will be afforded a hearing prior to discharge presents a substantial issue of due process. The Supreme Court of the State of Washington has held in *Nostrand* v. *Little*[36] that professors with tenure are entitled to a hearing under the terms of their employment contract and the rules and regulations under which the University of Washington is operated. The rights of state employees other than tenured professors were not before the Washington court in *Nostrand* and the court did not feel obliged to reach the question of the hearing rights of employees other than the plaintiffs there.[37] Whether or not the non-tenured employees of the University—some of whom are plaintiffs here—have a right to a hearing under any statutory provisions is unclear. Defendants have argued that such employees may be entitled to a hearing under the provisions of the Administrative Procedure Act[38] or under the State Civil Service Law.[39] Plaintiffs, on the other hand, [fol. 271] have argued that neither the Administrative Procedure Act, as construed in *Nostrand* v. *Little*, *supra*, nor the civil service statute are applicable to employees of the University, which is operated under rules and regulations adopted by the Board of Regents pursuant to statutory authority.[40]

Plaintiffs interpret the statutory language: "refusal to answer on any grounds shall be cause for immediate termi-

nation of . . . employment" [41] to mean that upon the refusal of an employee to sign the oath, for no matter what reasons, discharge will follow automatically and immediately, without any opportunity for the employee to explain or defend his refusal to sign. Plaintiffs' reading of the directive issued from the office of the President of the University requiring compliance with the statutory oath provisions leads plaintiffs to the conclusion that university officials similarly interpret the statute as requiring *automatic* and summary discharge for every refusal to sign regardless of the basis of the refusal. The statutory language does not compel such a conclusion and we are not persuaded that it is so interpreted by the University administration, nor that the statute will be so administered by them. The fact that refusal on any ground is declared to be "cause" for immediate termination of employment does not close the door to hearing and inquiry; nor does it preclude the exercise of administrative discretion if it should appear that the refusal to sign the oath is in no way related to a wilful refusal to make disclosure as to whether or not the employee is a member of a subversive organization.

In connection with the "automatic discharge" issue, defendants have cited the case of *Nelson* v. *Los Angeles County*,[42] which involved discharges of two county em- [fol. 272] ployees—one permanent, one temporary—after they refused to answer inquiries of an investigating committee relating to subversive activities. The case is not helpful inasmuch as the employees in *Nelson* were discharged for "insubordination." Furthermore, affirmance of the discharge of the permanent employee was by an equally divided court which renders the case of little value as a precedent.[43]

Plaintiffs, in turn, rely on *Slochower* v. *Board of Education*,[44] in which a statute providing for discharge of city employees who invoke the Fifth Amendment was held to be arbitrary and unreasonable because based on a "built-in" inference of guilt from the invoking of the constitutional privilege.

Although discharge of a state employee for failing to fulfill a condition of employment by signing the loyalty oath carries no necessary inference of disloyalty of the employee,

it would be ostrich-like to ignore the practical realities of a public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status. The severe impact of such a discharge upon an employee whose refusal may be motivated by considerations unrelated to disloyalty, invokes the protection of due process with compelling force.

The United States Supreme Court, in referring to language used in *Adler* v. *Board of Education*[45] and *United Public Workers* v. *Mitchell*,[46] has said, through Justice Clark:

> "To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . We need not pause to consider whether an abstract right to [fol. 273] public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

This principle expressed in *Wieman* v. *Updegraff*[47] was recently reaffirmed in *Cramp* v. *Board of Public Instruction*.[48]

It has not been urged here by defendants that plaintiffs are not entitled to such constitutional protection. On the contrary, defendants in their brief have urged this court not to assume that non-tenured employees are not entitled to a hearing under some aspect of Washington law. As was pointed out earlier in this opinion, in this declaratory judgment proceeding the dismissal policies and hearing procedures which would actually be put into effect by the University administration under the statute and/or under its own rules and regulations are a matter for speculation. On the showing here made this court will not presume that the defendant state officials will act arbitrarily or in disregard of constitutional rights of public employees, but this court must assume that the statute will be administered and applied in a constitutional manner.[49]

Finding no invalidity of Chapter 377, Laws of 1955, either on its face or in the light of the facts of record, we pass on

to a consideration of the oath of allegiance provisions of Chapter 103, Laws of 1931.

The Oath of Allegiance Statute

In the codification of Chapter 103, Laws of 1931 (RCW 28.70.150 and RCW 28.76.230), certain changes have been made in the language of some sections thereof. For this reason the entire chapter is set out in the footnotes for reference.[30] The statutorily-prescribed language of the oath [fol. 274] of allegiance is found in Section 1 of Chapter 103, which reads:

> "That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:
>
> "'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'
>
> "No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation."

In view of the mandatory language of the statute there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath.

Insofar as the arguments heretofore considered with respect to the loyalty oath are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable. Additional arguments particularly addressed to the oath of allegiance relate to alleged vagueness of the lan-

guage employed in the statutory form of oath; alleged infringement of religious liberty; and alleged interference with foreign relations, by, in effect, excluding foreign scholars from teaching positions at the University of Washington.

With regard to the latter argument we entertain doubts that the Washington legislature had in contemplation the [fol. 275] application of the oath requirement to aliens, or that the enactment consciously expressed any legislative intent to exclude foreign citizens from teaching positions in the State of Washington. In actuality, the oath prescribed by the 1931 statute has not been required of alien members of the teaching faculty at the University of Washington; but they have been permitted to modify the statutory language to reflect a limitation of the undertaking to that which is compatible with citizenship in another sovereign nation. It has been stipulated that it is the intention of the University administration to continue this policy.[51] In practice, foreign scholars are not excluded from teaching at the University of Washington nor is a condition imposed on them which is unreasonably inconsistent with their own national allegiance. On these facts, neither the impact of the 1931 statute on aliens nor any speculative effect of its enforcement on the pre-empted field of foreign relations, are properly before this court. The alien plaintiffs may not challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced.[52]

Plaintiffs raise issues in regard to alleged vagueness of the language of the prescribed oath of allegiance. In particular, they find uncertainty in the meaning and scope of the words, "institutions", "reverence for law and order", and "undivided allegiance to the government . . ." Certain plaintiffs who are Quakers are alarmed by what to them is the import of the phrase "undivided allegiance to the government . . .", which they construe to exclude the possibility of allegiance to God, humanity, individual conscience, or the concept of world government. In plaintiffs' brief it is argued that the statute seeks to establish an offi- [fol. 276] cial religion of secular nationalism and thereby infringes on religious freedoms guaranteed by the First Amendment to the United States Constitution.

Plaintiffs further state they do not know what positive changes in their subject-matter teaching may be expected of them if they swear to "promote" by "precept" and "example" the qualities enumerated in the statute.

These contentions of vagueness of the oath of allegiance statute raise substantial constitutional issues, bringing into question as they do the meaning and intended scope of the statute. Although statutory construction may resolve these questions in such a way as to remove doubts concerning constitutionality, it appears that the Supreme Court of Washington has never had occasion to construe the oath of allegiance provisions of Chapter 103, Laws of 1931, although declaratory judgment proceedings are available in the Washington courts. Authoritative interpretation of the statute by the Washington court may avoid the constitutional issue, or show it in clearer perspective, or resolve it. The following statements from Justice Stone's opinion in *Federation of Labor* v. *McAdory*[52] seem particularly applicable to the present case:

> "In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. *Spector Motor Co.* v. *McLaughlin, supra*, 105; see also *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543; *Huddleston* v. *Dwyer*, 322 U. S. 232. Such is not the function of the declaratory judgment.

> [fol. 277] "... it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes. See *Great Lakes Co.* v. *Huffman, supra*, 300, et seq."

The granting or withholding of equitable or declaratory relief in federal court suits which seek to limit or control state action is committed to the sound discretion of the court.[34] Accordingly, in the absence of a concrete factual showing that any plaintiff or any member of the classes of state employees here represented has suffered actual injury by reason of the application of the oath of allegiance statute (Chapter 103, Laws of 1931) this court will decline to render a declaratory judgment as to the constitutionality of that statute in advance of an authoritative construction by the Washington Supreme Court.

Having found no invalidity of Chapter 377, Laws of 1955, and having declined to consider the constitutionality of Chapter 103, Laws of 1931 in advance of state court interpretation, we deny plaintiffs' request for a permanent injunction against the enforcement of these statutes, and the preliminary injunction now in effect will be dissolved.

Counsel are directed to file with the clerk of the court within ten days from the date of this opinion an order in accordance with the conclusions herein stated.

Dated February 9, 1963.

Gilbert H. Jutting, United States Circuit Judge,
William J. Lindberg, United States District Judge,
W. S. Beeks, United States District Judge.

[fol. 278]

FOOTNOTES

[1] Chapter 9.81, Revised Code of Washington.

[2] *Nostrand* v. *Balmer*, 53 W. 2d 460; *Nostrand* v. *Little*, 362 U. S. 474; *Nostrand* v. *Little*, 58 W. 2d 111; *Nostrand* v. *Little*, 368 U. S. 436.

[3] *Subversive Person Ineligible for Public Employment.*

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (RCW 9.81.010 (5))

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence." (RCW 9.81.010 (2))

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010(3))

[fol. 279]

Communist Party Declared to be Subversive Organization.

"The communist party is a subversive organization within the purview of chapter 9.81 and membership in the communist party is a subversive activity thereunder." (RCW 9.81.083)

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

* RCW 28.70.150.

[5] RCW 28.76.230.

[6] Memorandum to All Members of University Staff, distributed by the office of the President on 28th day of May, 1962; Pretrial Order, pages 85-87.

[7] *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 288. *Uphaus* v. *Wyman*, 360 U.S. 72, 76-77.

[8] *Gerende* v. *Board of Supervisors*, 341 U.S. 56; *Garner* v. *Board of Public Works*, 341 U. S. 716; *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Adler* v. *Board of Education*, 342 U. S. 485.

[9] *Bridges* v. *California*, 314 U. S. 252, 261.

[10] *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401.

[11] *Nostrand* v. *Balmer*, 53 W. 2d 460, 465.

[12] See *Barenblatt* v. *United States*, 360 U.S. 109, 112.

[13] See *Sweezy* v. *New Hampshire*, 354 U. S. 234.

[14] RCW 9.81.060.

[15] *Shelton* v. *Tucker*, 364 U. S. 479; *Adler* v. *Board of Education*, 342 U. S. 485.

[16] See *Gerende* v. *Board of Supervisors*, 341 U. S. 56; *Garner* v. *Board of Public Works*, 341 U. S. 716.

[17] *Konigsberg* v. *State Bar*, 366 U. S. 36.

[18] *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Shelton* v. *Tucker*, 364 U. S. 479.

[19] 364 U. S. 479.

[20] 368 U. S. 278, 286.

[21] 354 U. S. 234.

[22] *Nostrand* v. *Balmer*, 53 W. 2d 460, 484.

[fol. 280]

[23] See *Uphaus* v. *Wyman*, 360 U. S. 72, 80.

[24] See *Shub* v. *Simpson*, 196 Md. 177, 76 A. 2d 332, certiorari denied 340 U. S. 861, in which the Maryland court so construed a statute couched in terms substantially similar to those employed in Chapter 377, Laws of Washington, 1955; and

Gerende v. *Board of Supervisors*, 341 U. S. 56, in which the United States Supreme Court affirmed *per curiam* a Maryland decision based on the interpretation of the statute as given in *Shub*.

[25] 367 U. S. 203.

[26] 367 U. S. 290.

[27] *Lerner* v. *Casey*, 357 U. S. 468.

[28] *Nelson* v. *Los Angeles County*, 362 U. S. 1.

[29] *Beilan* v. *Board of Education*, 357 U. S. 399.

[30] 357 U. S. 513.

[31] 366 U. S. 36.

[32] Id at page 52.

[33] *Speiser* v. *Randall*, 357 U. S. 513, 527.

[34] 350 U. S. 497.

[35] 360 U. S. 72.

[36] 58 W. 2d 111.

[37] *Nostrand* v. *Little*, 58 W. 2d 111, footnote 6 at page 133.

[38] Chapter 234, Laws of Washington, 1959; RCW 30.04.010 et seq.

[39] Chapter 1, Laws of Washington, 1961; Chapter 41.06, RCW.

[40] RCW 28.77.120 and RCW 28.77.130.

[41] RCW 9.81.070.

[42] 362 U. S. 1.

[43] *United States* v. *Pink*, 315 U. S. 203, 216; *Hertz* v. *Woodman*, 218 U. S. 205, 213-214.

[44] 350 U. S. 551.

[45] 342 U. S. 485.

[46] 330 U. S. 75.

[47] 344 U. S. 183, 191-2.

[48] 368 U. S. 278, 288.

[49] *Cf. Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, 384; affirmed *per curiam* 358 U. S. 101.

[fol. 281]

[50] Chapter 103, Laws of Washington, 1931:

"Section 1. That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:

"'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'

"No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation.

"Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, or is entirely or in part exempt from taxation, shall before entering upon the discharge of his or her duties subscribe to the oath or affirmation prescribed in section 1 before a person authorized by law to administer oaths and/or affirmations, such oath or affirmation to be executed in duplicate and one copy filed with the head of such institution and the other retained by such deponent.

"Sec. 3. The clerks of school boards are hereby authorized to administer the oath required by this act.

"Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided, and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void.

"Sec. 5. If any section of this act shall for any reason be held invalid, that such construction shall not affect the other provisions herein contained not expressly invalidated.

"Sec. 6. The oath herein provided shall be required of all teachers whose contracts are renewed or executed from and after March 1, 1931.

"Passed the Senate March 4, 1931.
"Passed the House March 10, 1931.
"Approved by the Governor March 20, 1931."

[fol. 282]

[51] Pretrial Order, page 77.

[52] Cf. *Poe* v. *Ullman*, 367 U. S. 497.

[53] 325 U.S. 450, 470-1.

[54] *Federation of Labor* v. *McAdory*, 325 U. S. 450; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293; *Railroad Comm.* v. *Pullman Co.*, 312 U. S. 496; *Burford* v. *Sun Oil Co.*, 319 U. S. 315.

[fol. 283] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
No. 5598

LAWRENCE W. BAGGETT, et al., Plaintiffs,

vs.

DOROTHY BULLITT, et al., Defendants.

MOTION TO STAY ENFORCEMENT OF JUDGMENT—
Filed February 19, 1963

Come now the plaintiffs through Kenneth A. MacDonald, one of their counsel of record and moves this Court for an Order staying the enforcement of the judgment when entered herein, and moving parties give the following brief written statement of reasons in support of this motion:

I

The appeal to be presented to the United States Supreme Court from the final judgment to be entered herein may become meaningless and that Court will lose jurisdiction thereof, if, the acts sought to be here enjoined have irretrievably occurred:

Brownlow v. *Schwartz*, 261 U.S. 216;
Richardson v. *McChesney*, 218 U.S. 487.

II

It is urgent and imperative that the status quo of the subject matter be preserved and the aforesaid jurisdiction of the Court protected in order to pass upon the substantial federal questions involved.

III

Plaintiffs submit herewith a supersedeas bond conditioned for the satisfaction of costs incurred by defendants on appeal, together with interest, in accordance with Rule 18, Supreme Court Rules.

IV

This motion should be presented after the entry of the [fol. 284] judgment, but because plaintiffs are before a three-judge District Court and because one judge thereof may not issue a stay, the motion is made now so that the three-judge Court can consider the motion at the time of considering and signing the judgment following submission of proposed orders by counsel.

Cumberland Telephone and Telegraph Co. v. *Louisiana P.S. Commission*, 260 US 212.

V

Plaintiffs are seeking a stay of a final judgment and thus this Court has a power to grant a stay. See *Twentieth Century Airlines v. Ryan*, 74 S Ct 8 98 L ed 143.

VI

Plaintiffs grant that any stay be for a limited time and conditioned upon their promptly giving proper notice of appeal, and taking affirmative steps to process and effect the appeal to the Supreme Court of the United States.

Wherefore, plaintiffs move that upon due notice and hearing, this Court stay enforcement of the judgment to be entered herein to allow plaintiffs to present their appeal promptly and diligently to the Supreme Court of the United States.

Dated at Seattle, Washington, this 19th day of February, 1963.

Kenneth A. MacDonald, Of Counsel for Plaintiffs.

Proof of service (omitted in printing).

[fol. 285] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

LAWRENCE W. BAGGETT, et al., Plaintiffs,

v.

DOROTHY BULLITT, et al., Defendants.

JUDGMENT AND ORDER—February 25, 1963

This class action asking the court to declare unconstitutional Chapter 377, Laws of 1955 of the State of Washington and Chapter 103, Laws of 1931 of the State of Washington, and seeking the issuance of a permanent injunction against the enforcement thereof, having come on regularly for hearing before this three-judge district court convened pursuant to the mandate of 28 U.S.C. §§ 2281 and 2284, and the court having studied the pretrial order, and the briefs filed herein, having heard arguments of counsel, and having heretofore filed a memorandum opinion, and being fully advised; now, therefore, the court enters its final judgment as follows:

It is adjudged that Chapter 377, Laws of 1955 of the State of Washington does not violate Article 1, Section 10, the First Amendment, the Fifth Amendment, or the Fourteenth Amendment of the Constitution of the United States; the subject-matter covered by said statute has not been preempted by Congress; and said statute is not unconstitutional.

It is adjudged that no declaratory judgment as to the constitutionality of Chapter 103, Laws of 1931 of the State of Washington, will be rendered by this court in advance of an authoritative interpretation of said statute by the [fol. 286] Supreme Court of the State of Washington.

It is ordered that the application for a permanent injunction against the enforcement of the abovementioned statutes be and it hereby is denied, and the complaint be and it hereby is dismissed with prejudice, and defendants are awarded their costs herein.

It is further ordered that the preliminary injunction now in effect herein be and it hereby is dissolved, subject, however, to any stay of the enforcement of this judgment which may be entered by this court pending an appeal to the Supreme Court of the United States.

Dated this 25th day of February, 1963.

Gilbert H. Jertberg, United States Circuit Judge.
William J. Lindberg, United States District Judge.
W. F. Beeks, United States District Judge.

[fol. 287]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

LAWRENCE W. BAGGETT, et al., Plaintiffs,

v.

DOROTHY BULLITT, et al., Defendants.

ORDER STAYING ENFORCEMENT OF JUDGMENT
—February 26, 1963

The court having heretofore filed a memorandum opinion and having entered judgment herein on the 25th day of February, 1963, and the plaintiffs having moved the court for an order staying the enforcement of the judgment

pending appeal, and the Court being of the opinion that a stay of the judgment should be granted pending appeal to the Supreme Court of the United States, now therefore,

It is ordered that, upon the filing of notice of appeal and of a suitable supersedeas bond in the amount of One Thousand ($1,000) Dollars conditioned for the satisfaction of costs incurred by defendants on appeal, together with interest, the enforcement of the judgment heretofore entered will be stayed for sixty days, subject to extension of the stay until final disposition of the case by the Supreme Court of the United States, upon a showing of prompt and diligent prosecution of the appeal.

Dated this 26th day of February, 1963.

Gilbert H. Jertberg, United States Circuit Judge.
William J. Lindberg, United States District Judge.
W. F. Beeks, United States District Judge.

[fol. 288] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
No. 5598

LAWRENCE W. BAGGETT, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, Plaintiffs,

vs.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ALBERT MURPHY, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 23, 1963

I

Notice Is Hereby Given that Lawrence W. Baggett, Z. W. Birnbaum, Joost E. Businger, Isabel S. Caro, Giovanni

Costigan, J. G. Dash, William A. Dawson, David M. Eaves, John M. Emlen, T. Saunders English, Victor Erlich, Robert G. Fleagle, Ronald Geballe, Patrick T. Goldsworthy, Milton P. Gordon, Alvin D. Greenberg, Robert E. Greengo, Gordon Griffiths, W. Mary Griffiths, Isaac Halpern, Arnold Hanson, W. Stull Holt, Abraham C. Keller, Arthur L. Kobler, Scott [fol. 289] Lytle, Robert W. MacDonald, D. F. Magee, Henry W. Maier, William H. Matchett, Karl P. Mauzey, Trevor J. McMinn, Irving Milowe, Rhoads Murphey, David S. Newman, Howard Nostrand, Gordon H. Orians, Simon Ottenberg, Jack R. Parsons, Eugene C. Pizzuto, Melvin Rader, Kenneth Eyre Read, Max Savelle, Annick Smith, C. A. Valentine, Leslie Warner, James B. Watson, Walter B. Watson, Philip E. Wilcox, Theodore W. Wilcox, William B. Woolf. Paul Dietrichson, Jon Bridgman, Boris A. Jacob, sohn, Patricia J. Keller, Lucille L. Curtis, Albert Nujenhuis, Richard Morrill, Willis Konick, Robert G. Clarke, and Theodore Lane, plaintiffs above named, appeal to the Supreme Court of the United States from the judgment and every part thereof as signed February 25, 1963 by Gilbert H. Jertberg, William J. Lindberg and W. T. Beeks, Judges of a three judge court (28 USC, Sections 2281 and 2284) sitting in the United States District Court, Western District of Washington, and as filed with the Clerk of that Court on February 25, 1963.

This appeal is taken pursuant to 28 USC, §1253 (62 Stat 926).

II

The Clerk of the United States District Court, Western District of Washington, Northern Division, will please prepare the following portions of the record and certify such portions to the Supreme Court of the United States:

Summons and Complaint

Affidavit of Service

Petition by Arval A. Morris to participate as counsel for plaintiffs

Order permitting Arval A. Morris to participate as counsel for plaintiffs

Motion to Dismiss Alex G. Gottfried as a plaintiff

Order Dismissing Alex G. Gottfried as plaintiff

[fol. 290] Application for Temporary Injunction and Temporary Restraining Order Restraining the University of Washington through Defendants from enforcing both oaths, and following affidavits in support thereof:

1. Gordon Griffiths
2. Kenneth E. Read
3. Ronald Geballe

Affidavit of Fred Thieme

Affidavit of Jean Ashford

Temporary Restraining Order and Order to Show Cause

Temporary Restraining Order Bond

Defendants' Motion to Dismiss

Memorandum in support of motion to dismiss with supporting papers

Notice of Amendment of Complaint amending paragraph No. 76

Memorandum in opposition to motion to dismiss and in support of motion for temporary injunction

Defendants' Memorandum in reply to portions of plaintiffs' brief opposing motion to dismiss

Memorandum Opinion on Motion to Dismiss

Affidavit of Service by Reginald Alleyne of Defendants' Memorandum in reply to portions of Plaintiffs' Brief opposing Motion to Dismiss

Order Dismissing Certain Plaintiffs

Answer

Notice of Deposition upon Oral Examination of Dr. Charles Odegaard and Herbert S. Little

Praecipe for issuance of subpoenas

Index to Pre-Trial Order

Trial Brief for plaintiffs

Trial Brief for defendants

Trial Reply Brief for plaintiffs

Motion by Defendant for continuance

Pre-Trial Order

Defendants' Reply Brief

[fol. 291] Memorandum Opinion

Motion to Stay Enforcement of Judgment

Plaintiffs' authority in support of motion to stay enforcement of judgment

Notice of Motion

Judgment and Order

Order staying enforcement of judgment

Bond

Proposed judgment by Herbert H. Fuller, Deputy Attorney General on behalf of defendants

Proposed judgment by Kenneth A. MacDonald, on behalf of plaintiffs

III

The following questions are presented by this appeal:

A. Whether two enactments, Chapter 103, Laws of Washington 1931 and Chapter 377, Laws of Washington 1955, on their faces and as they have been sought to be applied to appellants, and to others similarly situated, are unconstitutional in that they are repugnant to the Constitution of the United States of America in the following respects:

1. By violating the due process clause of the Fourteenth Amendment and through it, the First Amendment to the United States Constitution in abridging the consti-

tutionality protected freedoms of religion, speech and conscience, association, assembly, and academic freedom:

a) By infringing upon each and every one of the constitutionally protected freedoms without an evidentiary showing anywhere in the record that the state possesses a subordinating regulatory interest, which is compelling, or a showing herein of a need for the state to protect itself from a substantial danger, be that danger clear, present, or otherwise, existing by reason of the current or past employment at the University of Washington of advocates of the proscribed doctrines, or by the employ- [fol. 292] ment of those persons who refuse or fail to promote "by precept and example" the doctrines required by the 1931 statute, or by the employment of appellants, and others similarly situated, who for the reason of fear of possible recrimination, and for the added reasons of conscience, belief in academic freedom and constitutional liberty, refuse to sign the declarations demanded of them, that they do not so advocate or associate, or that they will so promote the state approved doctrines;

b) By infringing upon each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of unconstitutional conditions upon the continued enjoyment of employment, or future employment at the University of Washington by requiring that appellants and other similarly situated relinquish such constitutionally protected rights and freedoms as a condition precedent for continued employment at the University of Washington, where, as in this case, the evidence and record is barren of any showing by the state of any danger which the state could properly abate and which would justify the state's demand for an invasion and consequent relinquishment of said rights, and which would justify the imposition of conditions which are incompatible with the conditions necessary for an atmosphere of free inquiry and independent thought essential and necessary for realization of academic liberty at the University of Washington.

c) By abridging each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of prior restraints upon appellants and in language which is fluid, vague, shifting, speculative and uncertain, and through sanctions, including the threats of discharge from their employment, guilt, infamy, scorn, disloyalty, a finding of unfitness for employment, and prosecutions for subversion and/or perjury, thereby forcing appellants, and others similarly situated, to restrict their areas of constitutionally protected freedom, and where the [fol. 293] herein described prior restraints are unnecessary because two available and adequate alternative procedures currently exist and are available to the University of Washington, each such alternative being designed for a selective approach to this area rather than the blanket attack on constitutional freedoms curtailed by the enactments here in question;

d) By infringing upon the constitutionally protected freedoms from the establishment of religion and/or abridging the free exercise thereof and freedom of conscience, through the necessary operation and compulsion of these enactments which function in an automatic and summary manner without affording appellant employees any opportunity to decline participation in the state prescribed ritual and without affording a hearing at which a refusal to participate could be explained, defended, or justified;

e) By infringing upon each and every one of the constitutionally protected freedoms and due process of law, through statutory use of indefinite and vague standards, not susceptible of objective measurement, and which are so ambiguous, fluid and shifting that necessarily men of ordinary capacities (including appellants), at their peril, must guess as to the meanings of these standards and are forced to speculate as to the nature of penal, and other, laws that might be applied to them, thereby denying reasonable advance notice of the circumscribed areas of proscribed speech and association, subverting the presumption of innocence and shifting the burden of proof.

f) By infringing upon each and every one of the constitutionally protected freedoms, and denying due process of law, because these enactments function in an arbitrary and discriminatory manner being summary and automatic, and in doing so employ fluid, vague and indefinite standards thereby deterring the enjoyment of constitutionally protected freedoms without affording appellants their constitutionally protected rights, (1) to a reasonable notice of charges, (2) to a hearing, (3) to an opportunity to cross-examine wit- [fol. 294] nesses supporting charges against them, (4) to an opportunity to present witnesses on one's own behalf, (5) to an opportunity to be represented by counsel, (6) to the presumption of innocence, (7) to have the accusing party carry the burden of proof, and (8) to avail themselves of the protections afforded by the rules of evidence.

2. By violating the due process clause of the Fourteenth Amendment, and through it the incorporated privilege against self-incrimination found in the Fifth Amendment, in abridging these constitutionally protected freedoms through the imposition upon appellants of a statutory requirement that appellants, and others similarly situated as a condition of continued employment, gave evidence that may incriminate them and otherwise bear witness against themselves.

3. By violating Article I, Section 10, Clause 1 of the Constitution of the United States, in that said enactments are Bills of Attainder, constituting legislative infliction of pains, penalties, and punishment by conclusively presuming guilt, infamy, disloyalty and unfitness for employment at the University of Washington, said legislative infliction of punishment being made against appellants, and others similarly situated, without affording them their rights to trial or hearing, right to accusation, confrontation and cross-examination, or assistance of counsel, thus necessarily subverting the presumption of innocence, shifting the burden of proof, and altering the rules of evidence.

4. By violating Article I, Section 10 of the Constitution of the United States because said two statutes operate summarily and automatically, without notice or hearing termi-

nate and otherwise impair all teaching contracts and deny their further renewals to any and all members of the University of Washington teaching faculty, aliens and citizens alike, whether tenured or non-tenured, the faculty members otherwise being fully qualified, and said impairment of contract being based on the sole ground that appellants [fol. 295] and others similarly situated persistently refused when requested to execute oaths requiring, *inter alia*, that they subscribe to the disclaimers which are mandatorily required by Chapter 377, Laws of Washington 1955, as a condition of continued employment, or that they ". . . will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States".

5. By violating the exclusively vested federal power over foreign affairs and the supremacy clause of Article VI of the Constitution of the United States in attempting to regulate and restrict that sedition directed against the Government of the United States, and not being strictly confined to that sedition directed against the State of Washington, thereby impinging upon a field entirely within the province of the federal government, and which the President and Congress of the United States, by their exclusive powers as vested by the Constitution and by Congressional enactments, have preempted and wholly occupied.

B. Questions relating to Chapter 103, Laws of Washington, 1931.

1. Whether the District Court after determining that Section 4 of the 1931 Act was clear and unambiguous, and after determining that "there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal to sign the oath," properly refused to enter a declaratory judgment and permanent injunction as to Section 4 of the enactment, inasmuch as it clearly invades and abridges constitutionally protected freedoms.

2. Whether the District Court, after determining that one section of the 1931 Act raises substantial constitutional

issues, properly refused to render a declaratory judgment upon the remaining provisions of the 1931 enactment, prior [fol. 296] to its actual enforcement, solely on the ground that the record fails to show that any appellant had "suffered actual injury by reason of the application of the oath of allegiance statute (Chapter 103, Laws of 1931)."

3. Whether the legislature of the State of Washington possesses constitutional power and authority to disqualify absolutely from the profession of teaching in any school, private or public, an otherwise fully qualified citizen of the United States of America on the sole ground that he has refused, when requested, to testify that, *inter alia*, he ". . . will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States".

4. Whether the lower court properly held that all alien appellants, and others similarly situated, fail to present the requisite interest necessary to challenge the constitutional validity of the 1931 statute on the sole ground, contradicted by an express stipulation and exhibit in the record to the contrary, that the alleged future intent of the administering state officers is to violate their statutorily imposed duties and to apply said statute unevenly, differentiating between aliens and citizens, by altering for aliens the prescribed statutory wording of the oath.

5. Whether the 1931 enactment is repugnant to the Constitution of the United States by violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in arbitrarily requiring that said oaths be executed by the citizen faculty members of the University of Washington of whom there is less need for said oaths, if any need exists at all, and not requiring said oaths from the alien faculty members who are similarly situated and of whom there would appear to be greater need for said oaths, if any need be existing.

[fol. 297] C. Question Regarding Standing of Student Appellants.

1. An additional question is whether the lower court properly dismissed four students of the University of Washington, non-employees, plaintiffs below, solely on the ground that they lack the requisite interest to challenge the validity of the oath-requiring statutes here in question when their challenge to said enactments is taken on the ground of their rights to academic freedom and this action adjudicates those constitutional rights and the conditions for realizing learning freedom at the University of Washington.

Kenneth A. MacDonald, 1410 Hoge Building, Seattle 4, Washington; Arval A. Morris, Condon Hall, University of Washington, Seattle, Washington, Attorneys for appellants Lawrence W. Baggett, Z. W. Birnbaum, Joost E. Businger, Isabel S. Caro, Giovanni Costigan, J. G. Dash, William S. Dawson, David M. Eaves, John M. Emlen, T. Saunders English, Victor Erlich, Robert G. Fleagle, Ronald Geballe, Patrick T. Goldsworthy, Milton P. Gordon, Alvin D. Greenberg, Robert E. Greengo, Gordon Griffiths, W. Mary Griffiths, Isaac Halpern, Arnold Hanson, W. Stull Holt, Abraham C. Keller, Arthur L. Kobler, Scott Lytle, Robert W. MacDonald, D. F. Magee, Henry W. Maier, William H. Matchett, Karl P. Mauzey, Trevor J. McMinn, Irving Milowe, Rhoads Murphey, David S. Newman, Howard Nostrand, Gordon H. Orians, Simon Ottenberg, Jack R. Parsons, Eugene C. Pizzuto, Melvin Rader, Kenneth Eyre Read, Max Savelle, Annick Smith, C. A. Valentine, Leslie Warner, James B. Watson, Walter B. Watson, Philip E. Wilcox, Theodore W. Wilcox, William B. Woolf, Paul Dietrichson, Jon Bridgman, Boris A. Jacobsohn, Patricia J. Keller, Lucille L. Curtis, Albert Nujenhuis, Richard Morrill, Willis Konick, Robert G. Clarke, and Theodore Lane.

[fol. 298] Certificate of service (omitted in printing).
Acknowledgment of service (omitted in printing).

[fol. 299] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

No. 5598

LAWRENCE W. BAGGETT, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP F. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLE, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, Plaintiffs,

vs.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ALBERT MURPHY, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, Defendants.

PROPOSED JUDGMENT AND ORDER—Lodged February 19, 1963

Pursuant to a memorandum opinion dated February 9, 1963, this Court:

(1) Declares that Chapter 377, Laws of 1955, State of Washington, does not violate Article 1, Section 10, the First Amendment, the Fifth Amendment, or the Fourteenth Amendment of the United States Constitution, that the subject matter covered by this statute has not been preempted by Congress, and adjudges this statute constitutional;

(2) Declines to render a declaratory judgment as to the constitutionality of Chapter 103, Laws of 1931, in advance of an authoritative interpretation by the Washington Supreme Court;

[fol. 300] (3) Dismisses the plaintiffs' complaint with prejudice;

(4) Dissolves the preliminary injunction now in effect which started as a restraining order on June 25, 1962, and was continued as a preliminary injunction on July 13, 1962;

(5) Awards the defendants their costs.

Dated this ..... day of ....., 1963.

....., United States Circuit Judge;
....., United States District Judge;
....., United States District Judge.

Presented by John J. O'Connell, Attorney General; Herbert H. Fuller, Deputy Attorney General, of Attorneys for Defendants.

[fol. 301] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
No. 5598

LAWRENCE W. BAGGETT, et al., Plaintiffs,

vs.

DOROTHY BULLITT, et al., Defendants.

PROPOSED JUDGMENT DENYING COMPLAINT FOR DECLARATORY JUDGMENT AS TO A STATUTE OF THE STATE OF WASHINGTON AND JUDGMENT DECLINING TO RENDER DECLARATORY JUDGMENT AS TO ANOTHER STATUTE OF THE STATE OF WASHINGTON—Lodged February 19, 1963

This class action asking this Court to declare unconstitutional Chapter 377, Laws of 1955 of the State of Washington, which amended Chapter 254, Laws of 1951, and Chapter 103, Laws of 1931 of the State of Washington, and seeking the issuance of a permanent injunction against their enforcement against plaintiffs and other similarly situated on the grounds that such statutes are violative of Article 1, section 10 and of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, having regularly come on October 22, 1962, before a three judge District Court convened pursuant to the mandate of 28 USC sections 2281 and 2284 following pre-trial conferences and the preparation and filing of an extensive pre-trial order which included stipulations of fact relating to the background and academic setting of the controversy, statements of persons therein and exhibits attached thereto being admitted without objection, no testimony having been presented in open Court, and all parties represented by counsel; this Court having a jurisdiction under 28 USC sections 1331 and 1343 (3), and 42 USC section 1983, and the Court

having prepared and filed a memorandum opinion herein; the Court being fully advised, including the fact that dismissal or ineligibility must necessarily automatically result from refusal of a teacher to sign the oath prescribed by Chapter 103, Laws of 1931, it is the final order of this Court as follows:

[fol. 302] It Is Ordered that Chapter 377, Laws of 1955, State of Washington is not invalid on its face or in the light of facts of record, and

It Is Further Ordered that no declaratory judgment be rendered by this Court as to the constitutionality of Chapter 103, Laws of 1931, in the absence of an authorative construction of that statute by the Supreme Court of the State of Washington, and

It Is Further Orderad that the alien plaintiffs have no standing to challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced by the State of Washington, and

It Is Further Ordered that student plaintiffs in this action have no standing to challenge either of the statutes in question, and

It Is Further Ordered that no permanent injunction issued by this Court against the enforcement of Chapter 373, Laws of 1955 and Chapter 103, Laws of 1951 of the State of Washington, and

It Is Further Ordered that the preliminary injunction now in effect herein be dissolved, subject however, to any stay for the enforcement of this judgment to be entered by this Court pending an appeal to the Supreme Court of the United States.

Dated this ..... day of February, 1963.

....., ..., ...

Presented by: Kenneth A. MacDonald, Of Counsel for Plaintiffs.

Proof of service (omitted in printing).

[fol. 302a] Clerk's Certificate to foregoing transcript (omitted in printing).

CLERK'S NOTE

[fols. 303-305] Plaintiffs' Exhibits Nos. 1 and 2 "Oath Form A and Oath Form B" are omitted from the record here as they appear on printed pages 37 and 40, side folios 42 and 44 supra.

[fol. 307]

IN UNITED STATES DISTRICT COURT
UNIVERSITY OF WASHINGTON

PLAINTIFFS' EXHIBIT NO. 6

Office of the President

Seattle 5

February 6, 1959

Memorandum to the Deans

Subject: Documentation for Recommendations for Promotions or Tenure

I am enclosing the memorandum on Documentation for Recommendations for Promotions or Tenure as approved in the recent meeting of the Board of Deans.

I am requesting the deans of departmentalized colleges to take appropriate steps to bring to the attention of their executive officers the procedures outlined. Deans of non-departmentalized schools or colleges should coalesce directly into the form of their recommendation the material requested of executive officers along with that requested of deans.

/s/ CHARLES E. ODEGAARD

Charles E. Odegaard
President

CEO:rk

Enclosure

[fol. 308]

February 4, 1959

DOCUMENTATION FOR RECOMMENDATIONS FOR PROMOTIONS OR TENURE

In submitting to the President's Office a recommendation for promotion in rank or the granting of tenure, the dean of the school or college is requested to present a detailed documentation of the recommendation. The primary data would originate from the department.

Executive officers are enjoined to give careful attention to all phases of the candidate's service to the College and the University. Characteristic types of contributions to the University are described in the following terms under three headings:

Teaching. An essential qualification for appointment or promotion is the ability to teach, whether at the undergraduate or the graduate level. Some of the elements to be evaluated are personal and intellectual integrity, experience, knowledge of subject matter, skill in presentation, interest in students, ability to stimulate youthful minds, capacity for cooperation, and enthusiastic devotion to teaching. The responsibility of the teacher as a guide and friend properly extends beyond the walls of the classroom into other phases of the life of the student as a member of the University community. It also involves the duty of initiating and improving educational methods both within and outside his department.

Research. All members of the faculties must be persons of scholarly ability and attainments. Their qualifications are to be evaluated on the quality of their published and other creative work, the range and variety of their intellectual interests, their success in training graduate and professional students in scholarly methods, and their participation and leadership in professional associations and in the editing of professional journals. Attainment may be in the realm of scholarly investigation in such fields as the biological and physical sciences, the social sciences, and the humanities; in the realm of constructive contribu-

tions in professional fields such as engineering, forestry, medicine, dentistry, public health, and business; or in the realm of the creative arts in such fields as music, design, sculpture, painting, drama, and literature.

Service. The scope of the University's activities makes it necessary for members of the staff to engage in many activities outside of the fields of teaching and research. These may include participation in committee work and other administrative tasks, counseling, clinical duties, and special training programs. The University also expects many of its staff to render extramural services to schools, to industry, to local, state, and national agencies, and to the public at large.

In arriving at recommendations for promotion executive officers are requested to study the whole record of candidates. To warrant recommendation for promotion in the professorial ranks, a candidate must have shown superior ability in at least one phase of his activities, ability of such an order as to command obvious respect from his colleagues, and substantial contribution in other phases. The two qualifications of teaching and research must remain unequivocally the central functions of the faculty, but administrative and extramural services must also be recognized.

[fol. 309] The factors with reference to promotion thus far mentioned have to do with the qualifications of the candidate as an individual and may be regarded as the intrinsic factors. Consideration must be given to the way in which the candidate will fit into the present and foreseeable future of the department. Does there appear to be a place for a candidate with these special interests? Is there a reasonable balance among the skills and interests in the department? Will a given candidate help to bring the department into balance or throw it out of balance? It does happen that individuals whose performance would otherwise warrant promotion should not, and cannot, be promoted here because the peculiar nature of staff requirements in the department makes it undesirable to assure advancement. The particular bent which a young or recently arrived member of the faculty will take frequently

cannot be determined for several years. It is incumbent upon departments, schools, and colleges, however, to scrutinize closely the developing abilities especially of younger faculty members; and if it should appear that a given man is developing in a direction which for departmental reasons would tend to limit possibilities of promotion, he should be so advised and told that it would be wise to seek other employment.

In the interest of uniformity you are requested to submit your recommendations for promotion in strict accordance with the accompanying topical outline.

The form of the documentation would be as follows:

Dean's Letter to the President:

(a) If the procedure followed in evaluating the candidate varies from that prescribed in the Code, an explanation of reasons for the altered process;

(b) Critical evaluation at the school or college level of services, whether in teaching, research, university or college assignments or service to the state which have led to the recommendation;

(c) The candidate's accomplishments in the major university functions as described in the Faculty Code (Section 2432) since his last promotion or initial appointment;

(d) When promotion or tenure is recommended, are there any stated or implied commitments for the development of library, laboratory, or other special facilities which will be needed to carry on the work of the nominee?

Memorandum to departments would be as follows:

The departmental recommendation for promotion or tenure should be in the following form and cover the items listed:

(1) Description and critical evaluation of (1) *Teaching*, (2) *Research*, and (3) *Service* to the college, university, or the state, as covered in the statement of major university functions (Faculty Code, Section 2432).

[fol. 310] (2) A statement of special competence which the nominee has developed, together with copies of the letters or other evidence to be used by the school or college in judging his standing, reputation, and scholarly achievements;

(3) A complete and precise description of the role the nominee has in the departmental or school curriculum at the undergraduate *and* graduate level, and his place in its future development;

(4) A description of the program of research or creative activity the nominee is following and plans for the future;

(5) The departmental vote on the recommendation;

(6) If a previous recommendation for promotion or tenure has been denied in the past, a summary of the changes in the nominee's status, in respect to items (1) through (5) above, since that time should be summarized.

[fol. 311] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 7

FOR RELEASE: Friday, November 7, 1958
After 4 p.m., P.S.T.

INAUGURAL ADDRESS*

Charles E. Odegaard

President

University of Washington

Mr. Shefelman and members of the Board of Regents, Your Excellency Governor Rosellini, Honorable members of the Legislature, delegates of sister institutions and of learned and scientific societies, distinguished guests, Dr.

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* Delivered November 7, 1958, at ceremonies inaugurating Dr. Odegaard as president of the University of Washington, Seattle.

Schmitz, Faculty, Students, Alumni, and Friends of the University of Washington:

It is an honor for the University of Washington to have President Pusey of Harvard University participate in these inaugural ceremonies by delivering this fine and thoughtful installation address. It is a source of great pleasure to me that he is present on this platform on a day that has very special personal meaning for me. I am reminded of the first time I saw Doctor Pusey after he had assumed the presidency of Harvard University. It was six months or so later that I visited him in Cambridge. After chatting in his office in old Massachusetts Hall, Doctor Pusey walked me down a short corridor to a smallish room, gracefully furnished in eighteenth century style. A fine portrait of Benjamin Franklin looked wisely and beneficently down on the principal piece of furniture in the room, an oval mahogany table surrounded by about eight chairs. Doctor Pusey informed me that this was the meeting room of the Harvard Corporation, which consists of the President, the Treasurer and the five Fellows of Harvard University. He said that he had encountered remarkable devotion in the eminent men of affairs who leave their regular pursuits to meet every other Monday in this room to consider with him the welfare and government of Harvard University. He had found that in the estimation of such men there was no honor or public service in their part of the country which could be offered or obtained which could equal the prestigious invitation to become a member of the Harvard Corporation; for this is, he said, the board room of the oldest corporation in continuous existence in the territory of the United States. Dr. Pusey added characteristically, it is a very humbling thing to inherit the responsibilities of President of the University.

Indeed, one should stand in awe of universities, great and powerful men, kings and princes, popes and peers, presidents and governors, most in wisdom but some in fear, have held a decent respect for the influence—the ultimate leadership—which universities have exerted over the past eight hundred years. There must be something special about universities, for them to have this extraordinary survival

power, for them to retain their identity and continuity over all these centuries of conflict and change in Europe; to be carried forth to blossom in the new world from the rocky shores of New England to these forested hills of Puget Sound; or to be injected as foreign imports from the west into the colonial territories of Asia and Africa only to [fol. 312] survive the demise of the imperial authority as those former colonies have become sovereign powers.

Social inventions have come and gone over the centuries. Few have had the resiliency of this medieval invention, the University. For over eight hundred years universities have had their ups and downs, only to emerge after each languishment more vigorous and influential than before.

What then is this durable thing, a university? This question has been asked many times before, especially, and appropriately so, on occasions such as this. The most frequent answer, I suppose, has been "a community of scholars." Good words meaningful words, repeated often, sometimes slip into triteness, lose their savor, and are shrugged off with a kind of bored indifference. These words, this phrase, "community of scholars," actually had a rich significance in the very beginning of universities and it has continuing relevance in our own day. It still warrants our attention.

There were scholars, of course, well before the Middle Ages. The word itself is of Latin origin, and goes back to the Romans. The force of the phrase stems, however, from the word "community," community of scholars. The invention of the Middle Ages lies in the establishment of a *communitas*, something shared in common, a community of interest, among scholars. In effect, what these medieval scholars did was to bring individuals who had previously functioned largely in isolation into a group with a special identity; they formed with their members a single body, or as we would say today, they established a corporation. Indeed, the word university, *universitas*, was in origin nothing but a synonym for denoting this same process of incorporation. Its very etymology implies *turning* a group of individuals into *one* body. Over time, the use of the word *university* was restricted to one particular kind of corporation, to the community of scholars, to a university as we use the word today.

Most of the actual steps in the development of a university in the twelfth and thirteenth centuries are shrouded in obscurity, and historians argue over the dates at which given institutions may be said to have been established. Understandings among individual scholars in Paris, for example, and the outward recognition of these by others, emerge successively and not all at once. The general direction of development is clear in any case. The progression is in the direction away from the individualistic tutor to what might be called the group practice of scholarly teaching with the adoption of regulations affecting the government of the affairs of the community of scholars, the status of the master scholars or teachers or professors, the status of the student scholars, and the prescription of courses of instruction.

Finally there was the matter of the degree or license. You know that the phrase "community of scholars" is used with a connotation which embraces both the faculty and the students, the old learners, as it were, and the new learners. This was quite appropriate in the medieval setting. The older scholars taught the younger scholars in a particular way. In accordance with the technology of the time and the characteristics of the bookish learned traditions of that day, the teachers lectured; that is, they read passages from the costly manuscript books which contained the accumulated learning of the past and then brought in [fol. 313] more recent or contemporary insights by commenting upon the texts. A lecture was thus a combination of reading out loud and of talking when the students had imbibed a fair measure of this learning by listening to the prescribed course of lectures and through disputation, that is discussion largely among themselves, had cut their own teeth on the substance, they might be ready to try the examinations. They would appear before a board composed of teachers or professors and there be quizzed as to their knowledge, and if approved, be given permission to proceed to the final demonstration of proficiency, namely to be called upon to do what the master or professor characteristically did himself as a learned man; that is, he gave a lecture on a learned topic. This beginning (*inceptio*) of the practice of the master or teacher is the origin of the com-

mencement address, which in its proper ancient form was delivered by the graduating students.

At the same time, the successful candidate would, be a ceremonial gesture, be admitted to the grade of, the status of, the degree of a bachelor or master. The routine granting of a diploma is a fairly late form. In this country at Harvard, it was not until 1813 that all graduates received a diploma as a matter of course. Doctor Pusey's predecessor, at the first Harvard commencement in 1642, following the rhetorical performances of the graduating students, their commencing lectures, turned to each and said:

> "I admit thee to the first degree in Arts . . . according to the custom of the universities in England. And I hand thee this book, together with the powers to lecture publicly in any one of the arts which thou hast studied, whensoever thou shalt have been called to that office."

Here as a proof of admittance to higher learning there was still linked the book, the text, and the right to lecture upon it. The book, was of course, purely symbolic; and in all honesty, I must reveal, Doctor Pusey, that your predecessor appears to have been an Indian giver and to have taken back these books immediately. Harvard men do not seem subsequently to have held this ungenerosity against their alma mater. Indeed, they have returned the gift many fold in their magnificent contributions to the Harvard libraries.

There are still, in my judgment, important meanings in this medievalism for our time. Scholars, teachers possessed of the most advanced knowledge of their time, professors as we would say today, had existed before. Such men, by very definition, must be highly individualistic self-starters, impelled by their own curiosity to seek knowledge, great lovers of that elusive mistress, truth. They can be recognized and given opportunities for pursuing their work, appealed to for various causes, but hardly directed in their professional work as scholars. Who could have told Einstein what to do next? But they can be brought together by persuasion to work in a common enterprise in a way which makes the whole greater than the sum of the several parts.

What the Middle Ages established as a beginning was that such men, by grouping themselves together, by establishing the group practice of scholarship through the creation of a university, could enlarge greatly their own capacity for learning and for teaching. Individual scholars have made contributions to human history, but the establishment of the community of scholars has placed the learned and scientific traditions of mankind on a far firmer footing. [fol. 314] It has made available systematic education of the younger generation at the higher levels so that each successive generation could build more solidly and more quickly upon the work of its predecessors. Scholars themselves, to deal with the present frontiers of knowledge, now require facilities in libraries and laboratories which can only be provided through a collective enterprise. Through participation in the community of the university, they can advance knowledge far more rapidly than they could individually in isolation.

The powers that be even in the thirteenth century already came to respect the community of scholars through papal and royal charters and privileges which guaranteed an autonomous life for the merging universities. The tradition of university autonomy has come down into our own American history in which it is found that universities usually have been accorded a very special position. Education itself, from highest to lowest levels, was exempted by the founding fathers from federal control. Even at the state level it was protected through self denying constitutions and statutes of the several states from strong statewide controls. Basic responsibility for elementary and secondary education was delegated largely to local school boards which in turn have been kept separate from other branches of local government such as the cities and towns. At the level of higher education, universities under private auspices were encouraged and actually patronized under various provisions of the law which granted them privileges and large immunities. And when the states established universities under public auspices, they were given a substantial measure of autonomy by a variety of expedients including in some states even constitutional status to limit control from other branches of state government. They have not

been regarded as ordinary departments of state government under the control of the executive branch or as subject to conventional policy management by the legislatures.

This tradition of relatively great autonomy for universities in relation to government, stemming from medieval concepts, should not be dismissed as an archaic remain. There are continuing reasons for maintaining it. A degree of vigilance is needed just now in the United States because there has been a movement among some administrators in state government circles in the name of what they construe as efficiency to try to assimilate universities, at least the state universities, into just another branch of state government. Such a view is out of touch with our basic tradition and law, as I have indicated, and perhaps even more importantly, with the wisdom of the case.

Autonomy for universities is not a matter of special privilege for professors, presidents, or regents. It is a condition for the efficient performance of the tasks of the university. While the university might have been an invention in the first instance of scholars, it quickly came to be seen by others as a kind of insurance policy which society could take out as a guarantee of a better future. It is the special business of universities to encourage a second look at men and matter. They need maneuvering room for their continuing reanalysis of the universe and what is contained therein. They need a large amount of freedom in determining their own program in research and in teaching, for they alone contain the men truly competent to make the necessary judgments. The autonomy granted them is an act of faith by society in the kinds of individuals who pursue the scholarly life of teaching and research, and who are gathered together in a great university. Men in past generations have felt that this act of faith paid off [fol. 315] well enough that through their repeated acts of support universities have been enabled to persist at their task to the point that our oldest corporation still in business in the United States is a university. There are many indications that men still have this confidence today in universities.

I believe that you will agree that the need for the contributions of universities to our troubled society is now more evident than ever. This is no time then to diminish

their capacity to play their peculiar role in society by the misguided imposition of bureaucratic controls from outside persons not equipped to make the highly specialized kinds of judgment required in a university. There is little wisdom —and a great deal of harm—in the application of standards of efficiency which are not appropriate to the functions of universities, however appropriate they might be for other functions.

If one is indeed to espouse the university in these terms, he must face with humility the charge which is placed upon me today on behalf of the Board of Regents of the University of Washington. The task is large, the responsibility to the University and to society is great. The faculty has already brought distinction to this University and desires to see still greater distinction attained in rendering service. I promise the faculty that I shall try to sense with imagination what is needed in tools for scholarship, in the means of teaching and research, and to find ways by which the faculty may be more adequately, more equitably, supported. I promise no less, as a colleague, to seek to detect ways to improve our own awareness of our common concerns in teaching and research; and to devise channels through which the intellectual energy of the faculty may flow toward the further advancement of knowledge and the improvement of curriculums and teaching.

I promise the younger scholars, the students, that I shall try to find ways which will permit their masters to have that more intimate contact with them on scholarly matters which true teachers always desire so that out of this association there may emerge that love of scholarship which can attend the university educated man all the days of his life. Even though the graduating student may follow a career different from that of his teaching masters who admitted him to the degree or grade of bachelor or master or doctor, he should have acquired from his professors stimulation for the maintenance of curiosity, encouragement of the habit of study, and the experience of disciplined thinking. The nourishing care of alma mater must stretch the muscles of the student's mind at the risk of an occasional Charley horse, but it will be no less loving for all that, and no less in his best interest.

To the alumni who have loved this university, I promise to do what I can do to enlarge still more the basis for their legitimate pride in the institution. I promise also to turn to the alumni increasingly for that extra help in moral and material support which every university needs now from its sons and daughters, its past beneficiaries, if it is to measure up to the mighty task it faces in trying to provide adequate opportunities for the education of their sons and daughters.

To our sister institutions in higher education, so many of whom have graced this occasion with their representatives present here today, I promise to try to be a good neighbor and companion, recognizing our different areas of service and our common ground and need of mutual support.

[fol. 316] To His Excellency, the Governor, and the Honorable members of the Legislature of the State of Washington, I promise advocacy of the realistic needs of the University as it strives to be nothing less than a great university, serving greatly the people of the state as a human monument fit to match the inspiring mountains and distance perspectives which nature has lavished upon us here, a leader among institutions and not a follower, a pioneer among pioneers as great universities must by definition ever strive to be.

I reread recently *The Aims of Education* of Alfred North Whitehead in the paperback edition. It contains a brief but wonderful appreciation of him by Mr. Justice Frankfurter. The mere reading of it caused a warm feeling to flow over me, for I was one of that generation of students privileged to be invited into those wonderful Sunday evening coffee and conversation sessions in the Whitehead's apartment overlooking the Charles River. The breadth of the man, the depth of insight, that humility coupled with courage—yes, and gentle humor—in facing the awesome mysteries of the universe which surrounds us and which open up like a chasm within us radiated through his conversation as well as through his lectures. So too did his firm belief in man's use of reason, however blunted it might be, before the profound complexities of the world, and his

conviction that the universities had to be the guardians and the caretakers of this intellectual civilization.

Mr. Frankfurter quotes Professor Whitehead as follows:

> "The Aegean Coastline had its chance and made use of it; Italy had its chance and made use of it; France, England, Germany had their chance and made use of it. Today the Eastern American states have their chance. What use will they make of it? That question has two answers. Once Babylon had its chance, and produced the Tower of Babel. The University of Paris fashioned the intellect of the Middle Ages."

The Eastern American states, he says, have their chance. So indeed they do, and they have done well by it. The splendid example, to cite only one, which Harvard presents to the world today, Dr. Pusey, we unhesitantly and gratefully acknowledge.

Professor Whitehead voyaged far in his own lifetime. He liked adventures in living as well as in ideas. His historical sense taught him how the torch of learning had passed from Greece to Rome to Paris to modern Germany, and England, and to the Eastern States of the United States. He himself helped in this westward pilgrimage of learning by moving from the Old Cambridge in England to the New Cambridge in Massachusetts. If he were alive today, pondering on these matters a quarter century later, he would not have been surprised, I believe, by the thought that the Western States might have their chance too.

But he would have noted a change. The westward movement has now gone virtually full circle to meet the Levant, to flow into the lands of the rising sun; and there sits in our consciousness the realization that we are all now caught up in this global world in a troubled time. More is demanded than that the torch be tended now here, now there, as it is passed along. We are all in this world together and it is imperative that the torches of learning be held aloft and tended in many places. In purely national terms it is not enough to have a handful of great universities for [fol. 317] a country of 175,000,000, and those mostly in the East. If this intellectual civilization which Whitehead

prized is to survive and prosper in these United States, there must be a string of creative, I repeat, creative universities from East to West and from North to South. The Western States must do their part in accepting and building nothing but the best.

Let us be grateful then for models elsewhere. May it be given to us to recognize the best when we see it wherever we see it, to strive to emulate it here ourselves, and to do our share in fraternal affection in work in which our universities will ultimately succeed or fail together. We need not fear rivalry. We have far more reason to fear the inadequacy of the efforts of all our universities, the young in years in company with the ancient and venerable, in building around our civilization that wall of intelligence and understanding needed to restrain the eroding forces of ignorance and brutishness which could engulf us all. All of us, Eastern and Western, in and out of universities, must work in the hope that the American people will be enabled to escape the curse which now threatens modern man, the awesome great sentence which was noted by Professor Whitehead in the following words:

> "In the conditions of modern life the rule is absolute, the race which does not value trained intelligence is doomed. Not all your heroism, not all your social charm, not all your wit, not all your victories on land or at sea, can move back the finger of fate. To-day we maintain ourselves. To-morrow science will have moved forward yet one more step, and there will be no appeal from the judgment which will then be pronounced on the uneducated."

We must in the Western States take up still more the slack and not rely as much as in the past on what the Eastern States have provided if we are to give our sons and daughters their just due and to enable them and us to acquit ourselves of our fair share of responsibility in preventing all America from receding into the accursed land of the uneducated.

There is then a monumental task which faces us here in Washington and at the University of Washington. I know full well that I am but one of many who will serve the

University of Washington in these coming years. Each of us has his particular niche in a structure, the University, which far transcends us all. All these people dedicate themselves every day to her service that she may better serve mankind. I do not think it a poetic license to say that once again they are accepting this charge with me here today, grateful, as I am grateful, for the opportunity of service, humble before the responsibility but joyous in work which is pleasure, and hopeful that future generations will conclude that our efforts in our day were mostly on the side of making an understatement of Dr. Suzzallo's name for this institution, the University of a Thousand Years.

[fol. 318]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 8

University of Washington

INTERDEPARTMENTAL CORRESPONDENCE

Date January 23, 1962

To Professor Walter Watson
Department of Sociology
Smith Hall

FROM College of Arts and Sciences
Office of the Dean

Subject .....

Dear Professor Watson:

The Department of Sociology has recommended to me that your appointment as assistant professor be renewed for an additional period of three years, beginning with the academic year 1962-63. I am happy to endorse the department's request, and at the appropriate time I shall forward to the President my recommendation for your reappointment.

Please accept my best wishes for satisfaction and success in your work.

Sincerely yours,

/s/ Solomon Katz
Solomon Katz
Dean

SK:jv

cc: Professor Robert E. L. Faris

[fol. 319]

In United States District Court

Plaintiffs' Exhibit No. 9

University of Washington

INTERDEPARTMENTAL CORRESPONDENCE

Department
Sociology

January 30, 1962

Walter B. Watson
Thomson 301

Dear Walt:

You will shortly receive a note from the Dean's Office indicating that a renewal of your appointment for a specified three year period has been made. This notification is in accordance with the Faculty Code which requires that the Department recommend either continuation in this manner or termination of the appointment at an early time. Obviously the department recommended continuation to the Dean's Office and your appointment is therefore continued through the dates mentioned in the note.

Nothing in this letter precludes favorable changes, such as salary increases or even promotions, but it does mean

that the University will automatically extend your term as stated in the letter.

Sincerely yours,

/s/ Bob

Robert E. L. Faris
Executive Officer

gw

[fol. 320]

In United States District Court

Plaintiffs' Exhibit No. 10

Department of Mathematics

June 14, 1962

To: All Faculty, Graduate Assistants, and Staff:

The loyalty oath forms which must be signed according to state law are now available in Physics 245. According to regulations from the President's Office, these are to be signed and witnessed by a notary before October 1. A list of campus notaries whose services are free is available in our office. Please return the signed forms to the department office at your convenience.

Yours sincerely,

/s/ Carl B. Allendoerfer

Carl B. Allendoerfer
Chairman

[fol. 321]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 11

June 5, 1962.
Professor Ronald Geballe
Department of Physics

Dean Solomon Katz
College of Arts and Sciences

Dear Dean Katz:

A recent turn of events impels me to write you of my concern over an aspect of the Ilakovac appointment that I sent to you last week.

Shortly after I had prepared and sent you the Ilakovac material, I received the notice from the President's Office, dated May 28, 1962, but received later, informing the faculty and staff of the University that the 1955 loyalty oath now would be required. This requirement creates concern for the following reasons:

Our desire to invite Dr. Ilakovac is no different from the motivation for many such invitations in the academic community. A faculty vacancy is created when one of our permanent staff goes on leave. We seek about for a temporary replacement who will bring to us a scientific experience different from those already represented here, a record of productive and interesting research and a background that will assist us in meeting our responsibility for formal class instruction. These were the considerations that prompted our initial correspondence with Dr. Ilakovac some months ago.

The announcement respecting the oath places me in the embarrassing situation of having to inform Dr. Ilakovac, with whom we have negotiated openly and in good faith, and who is engaged in arranging his affairs in preparation for the visit, that a new element has suddenly been injected into the matter. He now will be faced with an oath that

might be impossible for him to sign for reasons totally irrelevant to the purpose and value of his visit.

An arbitrary alteration of terms always tends to reflect on the good name of a negotiator and in this case, the University will lose a little even if Dr. Ilakovac finds that he can sign the statement. If he cannot, the University is likely to lose considerably among the academic community. I realize that the oath is a statutory requirement that the Regents now are obliged to carry out. The timing of the Ilakovac case is unfortunate, whatever its other characteristics, but we cannot easily back out of it.

This same combination of circumstances leaves me in a quandry insofar as my own obligations respecting the oath are concerned. If the oath actually takes shape as quoted in the May 28 Notices, and were I to sign it, might not the forms which I have signed in connection with the Ilakovac appointment be used as a basis for a charge of perjury? [fol. 322] As far-fetched as it seems, we know that the recent past of our nation displays incidents of just this kind. How many other acts of this general nature have been committed by the faculty and the administration that might be construed as bases for perjury charges by some future investigator of subversive activities?

While some may have sincere and defensible grounds for objecting to the initial portion of the oath, many more will be affected by the second, disclaimer, part. The above paragraphs show how quickly a disclaimer oath can lead to a fear of personal jeopardy and thus to a very timid conduct of University affairs. I think there are additional reasons for believing disclaimer oaths to be harmful, but this one example is most striking.

Sincerely yours,

/s/ Ronald Geballe
Ronald Geballe
Chairman

RC:dj

[fol. 323]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 12

June 4, 1962

Kenneth E. Read, Chairman
Department of Anthropology
345 Savery

Dean Solomon Katz
College of Arts and Sciences
124 Thomson
Loyalty Oath

Dear Dean Katz:

I believe it is both proper and expedient that as chairman of the Department of Anthropology I express to you my concern for the effects which the requirements of the Loyalty Oath may have on our faculty next year. You know, of course, that we have made several new appointments commencing in September 1962. The individuals concerned are Professors Edward B. Harper, Raymond B. Fogelson and Luyse Kollnhofer (who is also an Austrian citizen). At the time when we were negotiating to secure the services of these scholars there was an injunction against the Loyalty Oath in the State of Washington which had not been determined. The individuals concerned were not advised that such an oath might be required of them as a condition of their employment by the University. It is entirely possible, therefore, that they have refused alternative offers, resigned from their present employment and have made arrangements to join us in the Fall whilst unaware of a condition which they are unwilling to accept. As a result they may encounter considerable hardship. It would seem honorable to advise them immediately that as matters now stand they will be required to file the signed oath by October 1st or relinquish the positions which they have accepted. On the other hand, prudence, and the best interests of the department seem to dictate delaying the issue as long as possible, at least until we have seen if there

will be a new attempt to challenge the constitutionality of the oath. If such litigation is unsuccessful, however, the latter procedure may simply compound the difficulties of the new members of our faculty, who thereby will have lost valuable time in seeking alternative positions.

My principal concern as the administrative head of the department must be to preserve as far as possible the continuity of our faculty and our academic programs. I am sure that you appreciate the difficulties we would face in attempting to find a replacement for any member of our faculty between now and the beginning of the next academic year. Accordingly I have decided that if I am required to confront new members of the department with the Loyalty Oath before any legal proceedings have been instituted in the courts, I shall give them the following counsel:

(a), that there is a possibility that legal proceedings to test the constitutionality of the oath will be instituted;

(b), that if they have any objections to signing such an oath they might consider it advisable to delay until the last possible moment, pending the possibility of a court injunction, but

(c), if they object to the oath and do not wish to place themselves in the difficult position which would result from unsuccessful court action, they should feel at liberty to advise me of their refusal to sign.

I am hopeful that legal action may be taken before it is necessary for me to confront new members of the faculty with the oath. But in case this does not occur I believe I will have to take the action outlined above. I advise you of it now because of the possible implications for the successful operation of the department next year.

Sincerely yours,

Kenneth E. Read, Chairman
Department of Anthropology

K.E.R.:agc

[fol. 324]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 13

University of Washington
INTERDEPARTMENTAL CORRESPONDENCE

June 6, 1962

Solomon Katz, Dean
College of Arts and Sciences

Professor Kenneth Read
Department of Anthropology

Dear Professor Read:

Thank you for your letter of June 4 regarding the so-called loyalty oath. I appreciate your concern for the effects which the requirements of the oath may have on your faculty next year. I hope, but obviously cannot be certain, that the issue will be resolved soon to the advantage and satisfaction of the University.

Meanwhile, I would suggest that you may wish to await the receipt of copies of the oath from the President's Office before you give new members of the faculty the advice you have outlined in your letter. It is possible that by that time you may be in a position to provide specific details of legal proceedings to test the constitutionality of the oath.

If you consider it inadvisable, however, to await the receipt of the oath forms, you may wish to inform new members of the department of the contents of the President's memorandum of May 28 and offer these members of the faculty the counsel you have outlined.

Sincerely yours,

/s/ SOLOMON KATZ
Solomon Katz
Dean

SK:sp

[fol. 325]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 15

UNIVERSITY OF WASHINGTON
DEPARTMENT OF MATHEMATICS
SEATTLE 5

December 18, 1961

Professor William B. Woolf
Department of Mathematics
University of Washington

Dear Bill:

According to Section 2441 of the Faculty Code, the Department and the College are required to review the status of all Assistant Professors who are in the second year of an initial three year appointment. The purpose of this review is to determine whether a renewal of the appointment will be made following the expiration of the initial three year term. In keeping with these regulations, I am very happy to write you that the renewal of your appointment has been approved by the Department and by Dean Katz. I am personally very pleased about this, for I believe that you are making an important contribution to the work of the Department and that the promise which we saw in you when you were first appointed has been more than fulfilled.

This renewal extends your appointment for a period which includes the year in which a decision will be made concerning your tenure at the University, but does not preclude an earlier promotion if the Department and the College believe this to be appropriate for you. The date of the award of tenure and the regulations concerning it are somewhat complicated and for this reason, I believe it best to refer you to Chapter 25 of the Faculty Code for the details. I should like to remind you, however, that the criteria for tenure include your effectiveness as a teacher, your growth as a scholar, and your other contri-

butions to the University and the community.. The College has recently reviewed these criteria and is about to publish a pamphlet which gives a detailed interpretation of them for the benefit of all members of the faculty. Although this is not yet available, it should be out within a few months. If you would like to discuss these with me in the meantime, I should be most happy to do so.

With best wishes for the holiday season.

Yours sincerely,

/s/ CARL B. ALLENDOERFER
Carl B. Allendoerfer
Executive Officer

CBA:be
cc: Dean Katz

[fol. 325a] Clerk's Note

Plaintiffs' Exhibit No. 16, "Affidavit of Mrs. Jean Ashford" is omitted from the record here as it appears on printed page 34, side folio 38 supra.

[fol. 326]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT NO. 17

August 14, 1962

State of Washington)
) ss.
County of King)

I, Arthur F. Smullyan, Professor and Executive Officer of the Department of Philosophy at the University of Washington, being duly sworn, depose and say:

1) that on or about June 4, 1962, I received a copy of a memorandum from Provost of the University of Washington, Frederick P. Thieme, on the subject of required oaths for faculty and staff;

2) that on or about June 4, 1962, I received a supply of oath forms A and B for the department of philosophy;

3) that soon after June 4, 1962, and before June 10, 1962, and in accordance with my duties as Executive Officer of the Department of Philosophy, I began to administer said oaths to the employees of the department of philosophy who are under my jurisdiction;

4) that Professors Melvin Rader and Paul Dietrichson were informed that they were required to execute oath form A;

5) that Professors Melvin Rader and Paul Dietrichson have refused to execute oath form A and have continued to do so.

/s/ ARTHUR SMULLYAN
Chairman, Department of Philosophy

Subscribed and sworn to before me this 14th day of August A.D., 1962.

/s/ Huldah Swinehart
Notary Public in and for the State of Washington residing at Seattle

(SEAL)

[fol. 327]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT NO. 3

THE
FACULTY
HANDBOOK

Parts I, II, and IV

(Emblem)
UNIVERSITY OF WASHINGTON
SEATTLE 1956

[fol. 328]

Chapter 24

APPOINTMENT AND PROMOTION OF FACULTY MEMBERS

* * * * * * * *

Section 2431. General Appointment Policy

The principal functions of a university are to preserve, to increase, and to transmit knowledge. Its chief instrument for performing these functions is its faculty, and its success in doing so depends largely on the quality of its faculty. The policy of this university should be to enlist and retain distinguished faculty members with outstanding qualifications.

Section 2432. Scholarly and Professional Qualifications of Faculty Members

A. Scholarship, the essence of effective teaching and research, is the obligation of all members of the faculty. A [fol. 329] faculty member's scholarship may be judged by the character of his advanced degrees and by his contribution to knowledge in the form of publication and instruction; it is reflected not only in his reputation among other scholars and professional men but in the performance of his students, both elementary and advanced.

B. The creative function of a university requires the appointment of faculty members devoted to inquiry and research. Among the criteria for evaluating research are publication of books, articles, and reviews of a scholarly nature; the directing of productive work by advanced students; the receipt of awards and fellowships; membership on boards and commissions devoted to inquiry; and the judgment of professional colleagues. Research may also be judged by significant achievement in an art related to a faculty member's work, such as musical composition, creative writing, or original design in engineering and architecture.

C. The educational function of a university requires the appointment of effective teachers who can transmit the results of research. Instruction must be judged according to

its essential purposes and the conditions which they impose. Among the criteria of teaching effectiveness are qualified student opinion, the performance of students, and the informed judgment of colleagues.

D. Contributions to a profession through published discussion of methods or through public demonstration of an achieved skill should be recognized as furthering the University's educational function.

E. Competence in committee and administrative work should be considered in judging a faculty member's qualifications, but except in unusual circumstances skill in instruction and research should be deemed of greater importance.

Section 2433. Qualifications for Regular and Research Appointments in Specific Ranks

A. Appointment to the rank of instructor normally requires completion of professional training, in many fields marked by the Ph.D.; and the promise of a successful career in teaching and research.

B. Appointment to the rank of assistant professor requires a record of successful teaching and research activity beyond that ordinarily required of an instructor.

[fol. 330] C. Appointment to the rank of associate professor requires a record of substantial success in both teaching and research, except that in unusual cases an outstanding record in one of these activities may be considered sufficient.

D. Appointment to the rank of professor requires outstanding, mature scholarship, and national recognition.

E. Appointment to a research rank requires qualifications corresponding to those prescribed for regular ranks in the preceding paragraphs of this Section.

* * * * * * *

Section 2437. Personal Qualifications for All Academic Appointments

A. In order to make its contribution a university must recruit able and responsible staff members who exhibit both perception and originality. A faculty member should pos- [fol. 331] sess unusual personal and intellectual integrity. He should have a free mind and should be dedicated to objective truth and its complete presentation. The University should avoid appointment of anyone who has personal traits which would negate his professional effectiveness or reflect discredit upon the academic profession. Especially should the University avoid appointment of anyone who seeks to diminish or destroy our liberties and our free institutions, upon which universities depend for their effective functioning.

B. The personal qualifications of acting or temporary appointees often may be judged by standards somewhat different from those applicable to regular staff members. Temporary personnel will not exercise lasting influence in University affairs, and for this reason certain personal characteristics which would disqualify a permanent appointee might be acceptable or tolerable in a temporary member of the faculty.

* * * * * * *

[fol. 332]

In United States District Court

Plaintiffs' Exhibit No. 4

THE FACULTY HANDBOOK

Volume II

(Supplement to the 1956 *Faculty Handbook*)

RULES AND REGULATIONS OF THE UNIVERSITY OF WASHINGTON

1958

* * * * * * *

[fol. 333]

Part A

INTRODUCTION

The University of Washington in the fall of 1952 called upon an administrative committee of representative and highly regarded members of its faculty to frame a clear-cut statement of procedures for handling recommendations for appointment.

This committee consisted of Professor Edwin R. Guthrie, former Dean of the Graduate School and former Executive Officer in Charge of Academic Personnel, as chairman; Dr. H. Stanley Bennett, Professor of Anatomy; Professor Alfred Harsch, of the School of Law; Dr. J. Richard Huber, Professor of Economics; and Dr. Sargent G. Powell, Professor of Chemistry. The group has labored hard and long in framing the accompanying report. The whole University, I think, owes this group a large debt of gratitude for a job well and conscientiously done.

Their report, it seems to me, presents as good a basis for dealing with one of the most difficult problems facing higher education as I have seen proposed anywhere. Times of danger such as these in which we live are likely also to be times of confusion. It is good in such a time to have a statement of policy which recognizes the dangers and, at the same time, sets a clear course as to how they can be met. The suggestions in this report should reassure the people of the state that subversive elements will not be allowed access to their University and that, at the same time, the freedom so essential to the University's progress will be adequately protected.

The report recognizes the danger of acting hastily and in response to hysteria. Pointing out that American universities have grown to greatness "in a climate of free enterprise and initiative," it calls for calm, judicious investigation and evaluation of adverse reports or rumors about individuals recommended for appointment and asserts that the mere existence of such reports or rumors should not in itself be a bar to recommendation. It calls upon the University to act with sound judgment, determination, and conviction to "promote originality of thought,

encourage free discussion, and provide for the advance and dissemination of learning without permitting itself to be used as a focus for violent and unconstitutional assaults on our free democratic institutions."

This report recognizes, wisely I believe, that the Uni- [fol. 334] versity's personnel policies should take into account the "whole man" and should consider personal and other qualifications as well as technical training and background. Further, the report suggests the wise procedure, too often neglected in situations where tempers tend to run short, that all elements of the University concerned with appointment procedures should review the qualifications of prospective appointees early in their consideration. This provision, it seems to me, provides opportunity for consultation and joint decisions which are especially important in large institutions where adequate communication is all too often difficult to maintain.

After the report was submitted, it was presented to the University Senate, the legislative body of the University faculty, and subsequently was given the endorsement of this group. Also, it was presented to the Board of Deans of the University and by them to the executive committees or the executive officers of the various schools and colleges of the University. In the latter instances, the report was accepted by all those groups. The only reservation in such approval of the report was that of the Council of the College of Arts and Sciences, which accepted the report subject only to the understanding that its provisions did not alter the normal administrative procedures of the University as laid down in the Faculty Code.

On the basis of these endorsements by faculty and administrative officers of the University, the report can be said to have achieved the widest kind of acceptance within the University family. Subsequently, the report was transmitted to and accepted by the Board of Regents of the University of Washington at its meeting of June 12, 1953.

Believing that this widely accepted statement of policy and procedure represents the best thinking of the faculty and officers of the University of Washington, it is my intention to utilize the statement as a guide in processing recommendations for appointments to the University staff.

HENRY SCHMITZ
President

[fol. 335]

Part B

REPORT OF THE COMMITTEE

Section 1. Basic Considerations Involved in Appointment of Faculty

The appointment policy of the University of Washington should be one which will recruit and retain able and distinguished faculty members with the outstanding qualifications needed for the University to fulfill its purpose. The policy should prevent the appointment of persons who do not have such qualifications, or whose presence on the faculty would impair the effectiveness of the University. The required qualifications can be appreciated only in the light of an understanding of the purpose of a university and its relationship to the society which supports it and which it serves. That purpose is to advance and transmit knowledge, and to make it available to society. Knowledge so discovered and disseminated is one of our great sources of national well-being and power, and an important foundation of good citizenship.

In order to make its contribution a university must obtain in its faculty the services of able and responsible persons with penetrating minds, with vision and originality. Faculty members must be able to master an important field of advanced learning, to contribute new knowledge to it, and to communicate their learning to society. Each must possess deep personal and intellectual integrity, a free mind, and be dedicated to objective search for truth and its honest and complete presentation. The University should avoid harboring within its faculty any who are dedicated to the destruction of our liberties and our free institutions, upon which universities depend for their effective functioning.

The wisest of appointment policies will fail if the men chosen will not accept the posts offered them, or if, having accepted, they find conditions at the University which make it difficult or impossible for them to make their proper contributions. Once an able and responsible faculty has been appointed, the community and the University have

further to provide facilities and atmosphere which will permit this faculty to function properly. Important in this connection is an atmosphere of freedom, in which scholars may give expression to their new contributions, even if some of the ideas prove to be strange or unpopular. For the United States and its universities have grown to greatness in a climate of free enterprise and initiative which [fol. 336] has provided the flexibility and adaptability to changing conditions necessary for a flourishing economy and society. The basic freedoms of individual thought, religion, speech, press, political participation, and economic opportunity, all these along with free universities form a mutually interrelated group of institutions upon which depend the continued welfare and preservation of our free society.

With these considerations in mind, the University of Washington must fulfill with sound judgment, determination, and conviction its responsibilities to the people of the state. It is responsible to all the people, not to any minority or pressure group, be it political, religious, or economic. The University should promote originality of thought, encourage free discussion, and provide for the advance and dissemination of learning without permitting itself to be used as a focus for violent and unconstitutional assaults on our free democratic institutions. The citizens of the state of Washington expect their University to assume its obligations fully, with wisdom, diligence, and courage, in the interests of the people and their future, without permitting itself to be diverted from this high purpose by intimidation, dictation, or veto of any group, however vocal or persistent.

Section 2. Legal Framework for Appointment Policy

The Board of Regents is charged with the responsibility for appointment of the University faculty, and, in recognition of the important place a university holds among our free institutions, the basic law quite properly gives to the Board the broadest latitude in the performance of this important function. The Subversive Activities Act of 1951, however, imposes a restriction upon the power of the Re-

gents to appoint or retain as a member of the University staff any "subversive person," defined therein as one who acts to obtain the overthrow of our constitutional government by force, revolution, or violence. Otherwise the Regents are unrestricted in their appointment power or policy, except as their judgment and sense of responsibility may direct them.

But even prior to the legislative enactment of 1951 the Regents, exercising the discretion vested in them by statute, had taken the position that active members of the Communist party are disqualified to serve upon the University faculty. This policy in effect anticipated the requirements of the state Subversive Activities Act.

[fol. 337] Section 3. Faculty Responsibility for Appointments

While, as stated above, the Regents have the legal and final authority for appointment, the faculty, including the President, is responsible for recommending to the Regents the names of persons to be appointed to the faculty. In the University the faculty is the group which has the highly specialized knowledge and background essential for judging the professional and scholarly competence and promise of a candidate for a faculty position. The members of the faculty are also in an advantageous position to obtain information with respect to the personal traits and characteristics which bear upon a candidate's qualifications for a faculty post. Full and discriminating consideration by the faculty of factors in both areas is crucial for an effective and smooth-working appointment procedure. The faculty, consequently, must investigate and evaluate the scholarly and personal characteristics of a prospective appointee, must determine, on the basis of all relevant evidence, his suitability for the position for which he is proposed, and must provide the Regents, through the President, with all information needed for intelligent action upon the recommendation.

Section 4. Administrative Procedure for Recommending Appointees

When a faculty vacancy arises, an appointment committee of faculty members is ordinarily named to search for suitable candidates and to determine and study their qualifications. These administrative committees are appointed by the departmental head, the dean of the college, or the President, in accordance with the nature of the proposed appointment. As may be appropriate, such a committee may be an *ad hoc* committee created to consider a single appointment, or a standing committee of a department charged with considering a series of appointments of a certain nature.

The appointment committee should carry out an investigation adequate to obtain the information required, exploring as thoroughly as possible each candidate's professional and personal qualifications bearing significantly on his effectiveness in the proposed post, and evaluating the ways in which each attribute may contribute to or detract from the proper functioning of the University. When, after such a study, the committee finds a candidate or candidates who appear to have suitable qualifications, the name or names and the information obtained should be transmitted [fol. 338] to the dean and the President. If the President or dean has any additional information which bears on the candidate's suitability, it should be added to the data already assembled. The committee should then study and evaluate the entire body of information, and arrive at a decision regarding a recommendation for appointment. If an appointment is then to be proposed, the recommendation, including all the pertinent information, should be transmitted through the appropriate administrative channels, as through the department head, dean, and President.

Section 5. Obtaining and Evaluating Information About Candidates for Appointment

The study and evaluation of the qualifications of a person recommended for appointment to the University of Washington faculty should so far as possible establish that he has the outstanding scholarly and personal quali-

fications and promise needed, and that his experience, ability, and special knowledge fit him for the vacant post. Much of the necessary data can be obtained from personal interview, from the candidate's own writings and academic record, from his statements about himself, and from inquiry among his friends, acquaintances, professional associates and colleagues.

The University and its faculty do not wish to appoint anyone who has adverse personal qualifications which would negate his effectiveness in his post or impair substantially the work of the University, or which would subvert and destroy our free institutions, among which our universities, themselves have an important place. In this respect the listing of an individual with members of organizations or groups which have come to be associated with subversive activity is worthy of special consideration in view of present tensions and attitudes. Many have deemed such listing in itself as evidencing subversiveness or disloyalty of the person so listed; indeed, in the state of Oklahoma a law based on this premise was passed, requiring among other things that each state employee swear that he had not been within a period of five years a member of any organization listed as subversive by the Attorney General of the United States. The Supreme Court of the United States ruled this law unconstitutional, stating in its opinion of December 15, 1953: "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its proclivities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first [fol. 339] time of the character of groups to which they had belonged. . . . At the time of affiliation a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing." A further consideration, not touched upon by the Supreme Court, is that some of the Communists recently convicted of perjury or of subversive activity have kept their names from lists of members of organizations of the character

here discussed. This emphasizes the unreliability of the lists in question, which may not only include the names of innocent, loyal, and well-meaning citizens, but may fail to designate persons active in subversive causes. If careful study and evaluation of all relevant findings lead to the conclusion that a person is in fact subversive or otherwise dedicated to the destruction of our free institutions, or that he possesses other disqualifying personal or moral characteristics, his appointment should not be recommended. Adverse reports or rumors should be calmly and judiciously investigated and evaluated. If such scrutiny leads to the conclusion that the adverse statements do not betoken any disqualifying characteristic in a prospective appointee, the mere existence of such adverse reports or rumors should not in itself be construed as a bar to recommendation. The decision will rest on the diligence, integrity, wisdom, judgment, and cooperation of the faculty, administration, and Regents, which in turn will be judged by many interested persons and groups within the state, the nation, and the academic world.

Section 6. Temporary and Acting Faculty Appointments

The procedure for selecting and appointing persons to the University staff in acting or temporary positions is similar to that for regular faculty appointments. In like manner, persons proposed for acting or temporary posts should be studied carefully, their scholarly and personal qualifications explored and assessed, and the propriety of the appointment established with respect to the Subversive Activities Act of 1951 and the University of Washington policy of avoiding the appointment of Communists or other subversive persons to the faculty. However, the qualifications of acting or temporary appointees may often be evaluated in a somewhat different context from those [fol. 340] of regular permanent appointments, for the former do not achieve positions of lasting influence in University affairs, and hence some personal characteristics regarded as disqualifying in a permanent appointee might be acceptable or tolerable for the brief duration of a temporary appointment.

Of these temporary appointments, Walker-Ames Professorships deserve special comment. These appointments carry high academic honor, and often attract considerable public interest. In considering persons for appointment in this category, special emphasis should be placed on the terms of the Walker-Ames bequest, which propose that the Fund be used by the Regents "to guarantee to the state of Washington the scholarly and educational services of the most distinguished minds available in this and other countries, and to acquire the services for said University of unusual minds. . . ." These posts should be reserved for persons of outstanding eminence, originality, and scholarly achievement, whom the University may not obtain or desire for the permanent staff, but who may bring new ideas, new knowledge, and scholarly inspiration to the campus during a brief sojourn without participating in the administrative functions of the institution. The University of Washington is fortunate in having available a fund for this worthy and rewarding purpose.

Section 7. Transient Visiting Lecturers and Artists

Visiting lecturers or visiting artists are on the campus only briefly, and their influence is neither widespread nor of long duration. Ordinarily, their contributions to the University are confined to their own field of specialty in art, science, literature, or the like. Their brief sojourn at the University, and the circumscribed nature of their presentations are such that an exhaustive advance study of all their personal and professional qualifications is not ordinarily justified. Such transient visits by able scholars and artists from other universities or cultural or scientific centers are of great value to the University. It is of the utmost importance that no crippling restrictions be placed on this type of activity.

It is customary for public lectures and concerts to be sponsored by a college or department, or by some organization such as Sigma Xi or Phi Beta Kappa, or by the Office of Lectures and Concerts. As the *Faculty Handbook* states, such public performances are to be given "with the approval and under the auspices of the Uni-

versity." The responsibility for making proper arrange-
[fol. 341] ments for such public events therefore lies jointly with the sponsoring division and with the President of the University. Agreement with respect to persons and program should be reached between the President and the sponsoring organization before any commitment or public announcement is made.

Transient visiting lecturers and artists perform a valuable service by bringing to the awareness of the students, faculty, and public the existence and nature of important developments or trends of thought in other places. All human and natural phenomena, whether or not they be of benefit to mankind, whether or not they be controversial or popular, form legitimate subjects for scholarly study and discussion at a university. A great university must provide for its faculty and students adequate opportunity for balanced hearing and evaluation of all representative points of view. For this reason, the University of Washington will serve its purpose best if it permits wide latitude in the utilization of the services of transient visiting speakers and artists.

Edwin R. Guthrie, Chairman
H. Stanley Bennett
Alfred Harsch
J. Richard Huber
Sargent G. Powell

May 26, 1953

[fol. 342]

SUPREME COURT OF THE UNITED STATES

No. 220, October Term, 1963

LAWRENCE W. BAGGETT, et al., Appellants,

vs.

DOROTHY BULLITT, et al.

ORDER NOTING PROBABLE JURISDICTION—October 14, 1963

Appeal from the United States District Court for the Western District of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM [illegible] 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENCO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Appellees.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

ARVAL A. MORRIS
School of Law
University of Washington
Seattle 5, Washington

KENNETH A. MACDONALD
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Seattle 4, Washington

Attorneys for Appellants

Of Counsel:
BYRON D. CONEY

METROPOLITAN PRESS AND WESTERN SEATTLE, WASHINGTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.....

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Appellees.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.....

LAWRENCE W. BAGGETT, et al.,
Appellants,

v.

DOROTHY BULLITT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

Appellants, sixty people employed at the University of Washington, and others similarly situated, directly appeal this class action from the judgment and final order dismissing appellants' complaint with prejudice, by a three-judge United States District Court, Western District of Washington, Northern Division, entered on February 25, 1963. The final order in this case adjudged that Chapter 377, Laws of Washington, 1955, and its oath, were "not unconstitutional" as construed and as sought to be applied to appellants, and to others similarly situated, and that no declaratory judgment as to the constitutionality of Chapter 103, Laws of Washington, 1931, and its oath, would be rendered. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction over this direct appeal and that this appeal presents substantial federal questions.

OPINION BELOW

The unanimous opinion of the three-judge United States District Court, rendered February 9, 1963, has been reported in 215 F. Supp. 439 (W. D. Wash. 1963). A copy of this opinion and the judgment and final order in this case are attached hereto as Appendix A.

JURISDICTION

This class action was filed on June 6, 1962, in the United States District Court, Western District of Washington, Northern Division, by sixty employees of the State of Washington employed at the University of Washington. This suit was filed pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983. *Bell v. Hood*, 327 U.S. 678. The complaint prayed that two statutes, and their required oaths, of the State of Washington, on their faces and as they have been sought to be applied to appellants, and others similarly situated, be declared and adjudged, by the District Court, to be unconstitutional, void and of no effect, and that certain named state officials, and their successors, be permanently enjoined from further enforcing, operating and executing said statutes, and their required oaths, and that appellants be granted costs, and other equitable relief as may be proper.

Upon the filing of the complaint a three-judge district court was convened pursuant to 28 U.S.C. §§ 2281 and 2284, and on July 13, 1962, it heard arguments on appellants' motion for an interlocutory injunction and on appellees' motions to dismiss. The motions to dismiss were denied, except as to four student plaintiffs, appellants here, who were dismissed from this action by the District

Court. A temporary injunction was granted pending a full hearing on the merits. Several lengthy pre-trial hearings were held; an extensive pre-trial order was prepared containing many stipulations, including one that no oral testimony would be presented at hearing, but that, without objection, the testimony of several persons would be, and has been, set forth in the pre-trial order, and another stipulation that a number of exhibits were admitted without objection. After hearing and opinion, the District Court, on February 25, 1963, entered a final judgment and order in this case that Chapter 377, Laws of Washington, 1955, was "not unconstitutional" and that no declaratory judgment would be rendered as to the constitutionality of Chapter 103, Laws of Washington, 1931. Its final judgment ordered that the complaint of appellants be dismissed with prejudice.

On April 23, 1963, appellants filed a notice of appeal with the United States District Court, Western District of Washington, Northern Division.

The jurisdiction of the Supreme Court of the United States to review, by way of direct appeal, the decision in this case by the District Court, Western District of Washington, Northern Division, is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court directly to review the judgment and order entered in this case: *Bailey v. Patterson*, 369 U.S. 31; *Shelton v. Tucker*, 364 U.S. 479; *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, and *Palmetto Fire Ins. Co. v. Conn.*, 272 U.S. 295. And see *Gerende v. Bd. of Supervisors*, 341

U.S. 56; *Adler v. Bd. of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Higher Education*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234; *Speiser v. Randall*, 357 U.S. 513, and *Cramp v. Florida*, 368 U.S. 278.

STATUTES INVOLVED

The statutes involved are: Chapter 103, Laws of Washington, 1931, (RCW 28.70.150, RCW 28.76.230) and Chapter 377, Laws of Washington, 1955, amending the Washington Subversives Activities Act, Chapter 254, Laws of Washington, 1951, (RCW 9.81.010 et seq.). These statutes and their required oaths are printed in Appendix B to this statement.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. *Whether two enactments of the Washington Legislature, Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, on their faces and as they have been sought to be applied to appellants, and to others similarly situated, are unconstitutional in that they are repugnant to the Constitution of the United States of America in the following respects:*

1. By violating the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution, in abridging the constitutionally protected freedoms of religion, speech and conscience, association, assembly and academic freedom:

(a) By infringing upon each and every one of the con-

stitutionally protected freedoms without an evidentiary showing made anywhere in the record that the state possesses a nexus, or a subordinating regulatory interest, which is compelling, or without any showing herein of a need for the state to protect itself from a substantial danger, be that danger clear, present, or otherwise, existing by reason of the current or past employment at the University of Washington of advocates of the proscribed doctrines and associations, or by the employment of those persons who refuse or fail to promote "by precept and example" the doctrines required by the 1931 statute, or by the employment of appellants, and others similarly situated, who, for the reason of fear of possible recrimination and on the added grounds of conscience, academic freedom and constitutional liberty, refuse to sign the declarations demanded of them, that they do not so advocate or associate, or that they will so promote the state-approved doctrines;

(b) By infringing upon each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of unconstitutional conditions upon either the continued enjoyment of employment, or future employment, at the University of Washington by requiring that appellants, and others similarly situated, relinquish their constitutionally protected rights and freedoms as a condition precedent for their continued employment at the University of Washington, where, as in this case, the evidence and record are barren of any showing by the state of any danger which the state could properly abate, or which would justify the state's demand

for an invasion and consequent relinquishment of said rights, and which would justify the imposition of conditions upon employees of the University of Washington which are incompatible with the conditions necessary for an atmosphere of free inquiry and independent thought essential and necessary for realization of academic liberty at that University;

(c) By abridging each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of prior restraints upon appellants, imposed by language which is fluid, vague, shifting, speculative and uncertain, and through sanctions, including the threats of: discharge from their employment, guilt, infamy, scorn, disloyalty, findings of unfitness for employment, and prosecutions for subversion and/or perjury; thus, forcing appellants, and others similarly situated, to restrict their areas of constitutionally protected freedom; and where the herein described prior restraints are unnecessary because two available and adequate alternative procedures, having the same purposes as the oaths in issue, currently exist and are available, and are used, by the University of Washington, each such alternative is designed for a selective approach to this area rather than the blanket attack on constitutional freedoms curtailed by the oath enactments here in question;

(d) By infringing upon the constitutionally protected freedoms from the establishment of religion and/or abridging the free exercise thereof and freedom of conscience, through the necessary operation and compulsion of these enactments which function in an automatic and summary

manner without affording appellant employees any opportunity to decline participation in the state prescribed ritual and without affording a hearing at which a refusal to participate could be explained, defended, or justified;

(e) By infringing upon each and every one of the constitutionally protected freedoms, and denying due process of law, because these enactments function in an arbitrary and discriminatory manner being summary and automatic, without affording appellants their following constitutionally protected rights: (1) to a reasonable notice of charges, (2) to a hearing, (3) to an opportunity to cross-examine witnesses supporting charges against them, (4) to an opportunity to present witnesses on one's own behalf, (5) to an opportunity to be represented by counsel, (6) to the presumption of innocence, (7) to have the accusing party carry the burden of proof, and (8) to avail themselves of the protections afforded by the rules of evidence; and such denial of constitutionally protected rights is accomplished by fluid, vague and indefinite standards thereby further deterring the enjoyment of constitutionally protected freedoms;

(f) By infringing upon each and every one of the constitutionally protected freedoms and due process of law, through statutory use of indefinite and vague standards, not susceptible of objective measurement, and which are so ambiguous, fluid and shifting that necessarily men of ordinary capacities, (including appellants), at their peril, must guess as to the meanings of these standards and are forced to speculate as to the nature of penal, and other, laws that might be applied to them, thereby denying rea-

sonable advance notice of the circumscribed areas of proscribed speech and association, subverting the presumption of innocence and shifting the burden of proof.

2. By violating Article I, Section 10, Clause 1 of the Constitution of the United States, in that said enactments are Bills of Attainder, resulting in legislative infliction of pains, penalties, and punishment by conclusively presuming guilt, infamy, disloyalty and unfitness for employment at the University of Washington, said legislative infliction of punishment and pain being made against appellants, and others similarly situated, without affording them their rights to trial or hearing, right to accusation, confrontation and cross-examination, or assistance of counsel, thus necessarily subverting the presumption of innocence, shifting the burden of proof, and altering the rules of evidence.

3. By violating the exclusively vested federal power over foreign affairs and by infringing upon the supremacy clause found in Article VI of the Constitution of the United States in attempting to regulate and restrict that sedition directed against the Government of the United States, and not being strictly confined to that sedition directed against the State of Washington, thereby impinging upon a field entirely within the province of the federal government, and which the President and Congress of the United States, by their exclusive powers as vested by the Constitution and by Congressional enactments, have preempted and wholly occupied.

4. By violating the due process clause of the Fourteenth Amendment, and through it the incorporated privilege against self-incrimination found in the Fifth Amendment,

in abridging these constitutionally protected freedoms through the imposition upon appellants of a statutory requirement that appellants, and others similarly situated, as a condition of continued employment, give evidence that may incriminate them, and otherwise bear witness against themselves.

B. *Questions relating to Chapter 103, Laws of Washington, 1931.*

5. Whether the District Court, after determining that Section 4 of the 1931 Act was clear and that it unambiguously operated in a summary manner: "There can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal to sign the oath," properly refused to enter a declaratory judgment and permanent injunction as to Section 4 of the enactment, inasmuch as it infringes upon and abridges constitutionally protected freedoms;

6. Whether the District Court, after determining that one section of the 1931 Act raised substantial constitutional issues, properly refused to render a declaratory judgment upon all the provisions of the 1931 enactment, prior to its actual enforcement, solely on the ground that the record fails to show that any appellant had "suffered actual injury by reason of the application of the oath of allegiance statute" (Chapter 103, Laws of 1931).

7. Whether the legislature of the State of Washington possesses constitutional power and authority to disqualify absolutely from the profession of teaching in any school, private or public, an otherwise fully qualified citizen of

the United States of America on the sole ground that he refused, when requested, to testify that, *inter alia*, he ". . . will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

8. Whether the lower court properly held that all alien appellants, and others similarly situated, fail to present the requisite interest necessary to challenge the constitutional validity of the 1931 statute on the sole ground, contradicted by an express stipulation and exhibit in the record to the contrary, that the administering state officers intend to violate their statutorily imposed duties and to apply said statute unevenly, differentiating between aliens and citizens, by altering for aliens the prescribed statutory wording of the oath.

9. Whether the 1931 enactment is repugnant to the Constitution of the United States by violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in arbitrarily requiring that said statutorily-worded oaths be executed by the citizen faculty members of the University of Washington of whom there is less need for said oaths, if any need exists at all, and not requiring exactly the same worded oath from the alien faculty members who are similarly situated and of whom there would appear to be greater need for said oaths, if any need be existing.

C. *Question Regarding Standing of Student Appellants.*

10. An additional question is whether the lower court

properly dismissed four students of the University of Washington, non-employees, plaintiffs below, solely on the ground that they lack the requisite interest to challenge the validity of the oath-requiring statutes here in question when their challenge to said enactments is taken on the ground of their rights to academic freedom and when this action adjudicates those constitutional rights and the conditions for realizing learning freedom at the University of Washington.

STATEMENT OF THE CASE

The sole issue in this case is the constitutionality, on their faces and as sought to be applied herein, of several statutes of the State of Washington, and their required oaths, as set out above. Although the District Court declined to make any findings of fact, which had been requested by counsel, the operative facts in this case are undisputed, there being no evidence in the record to rebut them.

The 1931 Statute

In 1931, without holding any hearings on the subject and without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 103, Laws of Washington, 1931, which sets forth, in statutory terms, the following oath:

> "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and institutions of the United States of America and

the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

This 1931 statute further provides that the taking of said oath shall be an absolute and mandatory condition precedent for each and every person applying for, or renewing, a contract to teach in the State of Washington. If this required oath is not executed annually, then, as the statute provides: "No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation."

No person in the State of Washington is qualified to engage in the profession of teaching, in public or private schools, without first having obtained prior state approval. (See Chapter 97, Subchapter 4, Article VII, § 1, p. 306, Laws of Washington, 1909, and *State ex rel Shoreline School District No. 412 v. Superior Court*, 55 Wn.(2d) 177, 346 P.(2d) 999.) And, since no person in the State of Washington can legally obtain a certificate to teach or enter into a teaching contract without executing the above stated oath, it stands as a mandatory condition precedent for each person to execute prior to his entry into the teaching profession or prior to his executing a contract to teach in that state. By statute, this oath must be sworn to by every "professor, instructor or teacher employed by any state institution of higher learning . . ." (RCW 28.76.230). Any contract entered into without the prescribed oath having been subscribed to is, automatically, rendered

null and void, and any affiant who subscribes falsely to said oath, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010). The 1931 enactment, as the District Court declared, operates automatically, thereby excluding all possibilities of a hearing where a tenured or non-tenured faculty member at the University of Washington, be he alien or citizen, could explain, defend or justify his refusal to subscribe to the oath.

The 1955 Statute

Later, in 1955, and again without holding any hearings, and again without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 377, Laws of Washington, amending its 1951 Subversive Activities Act (RCW 9.81.010 et seq.). This amendment sets forth a requirement in addition to those imposed by the 1951 Subversive Activities Act: that the official heads of each state agency, thus including the Board of Regents of the University of Washington, shall require that each and every employee, or applicant for state employment, at every such agency, thereby including all members of faculty and staff of the University of Washington, shall state under oath whether or not he or she knowingly is a member of the communist party or other subversive organization, or is a subversive person as those terms have been defined by the definitional sections of the 1951 Subversive Activities Act, part of the penal code of Washington which serve also to define various crimes of subversion

denounced by the 1951 Act. Printed forms of the required oath (see Appendix B) in the following language have been distributed to employees of the University:

> "I certify that I have read the provisions of RCW 9.81.010 (2), (3) and (5); RCW 9.81.060; RCW 9.81.070, and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and
>
> "I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
>
> "I understand that this statement and oath are made subject to the penalties of perjury."

This last quoted sentence, by express statutory enactment (RCW 9.81.110), calls into play the Washington perjury statute (RCW 9.72.010) and, in addition to loss of employment, that statute makes any knowing misstatement in the oath form subject to the penalties of perjury, carrying a term of imprisonment in the state penitentiary for not more than fifteen years.

Pursuant to Section 1 of the 1951 Subversive Activities Act (Chapter 254, Laws of Washington, 1951, RCW 9.81.010 et seq.) a subversive person is defined as:

> "*Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.*
>
> "(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form

of the government of the United States, or of the State of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (RCW 9.81.010 (5))

A subversive organization is defined as:

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence." (RCW 9.81.010 (2))

"Communist Party Declared to Be Subversive Organization.

"The communist party is a subversive organization within the purview of Chapter 9.81 and membership in the communist party is a subversive activity thereunder." (RCW 9.81.083)

A foreign subversive organization is defined as:

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, and to establish in place thereof

> any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010(3))

This last section is not qualified in any way by terms such as overthrow of government by *force, violence* or *revolution.*

Section 2 of the 1951 Subversive Activities Act, not directly in issue in this case, but relevant to it, makes certain defined "subversive activities" a felony; while Section 3 makes it a felony to remain or become a member of a subversive organization or foreign subversive organization knowing such organization to be such. Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office and from voting in state elections. Section 5 provides for the dissolution of such organizations and the distribution of their property. Sections 6, 7, 8, 10 and 21 were vetoed, and Section 9 requires that the attorney general report to the governor and legislature biennially.

Section 11 absolutely disallows any "subversive person" from eligibility for all state employment and public office. Sections 12 and 13 require that each board or agency of state government institute independent procedures to determine whether any employee is a "subversive person," and Section 14 requires that every state employee, as of June 1, 1951, submit a written statement to his agency to the effect that he or she is not a "subversive person," and that if an employee fails to submit the statement or submits an admission that such employee is a "subversive

person," then he "shall immediately be discharged." Section 15 requires the discharge of any "subversive person" if reasonable grounds exist to believe that any employee is such, and Section 16 requires that all candidates for public office file an affidavit that he is not a "subversive person." Section 17 makes any misstatements by employees punishable as perjury, and Section 18 is a severability clause. Section 19 states that the Act shall not be construed so as not to authorize civilian or military censorship or as to infringe upon freedom of speech or other constitutional guarantees. Section 20 provides the short title of the Act, "The Subversive Activities Act," and Section 22, the final section, declares that the Act shall take effect immediately.

The definitional sections of the 1951 Act, set forth above, have twice been passed upon by the Washington State Supreme Court (*Nostrand v. Balmer*, 53 Wn.(2d) 460, 335 P.(2d) 10, and *Nostrand v. Little*, 58 Wn.(2d) 111, 361 P.(2d) 551). The Washington court has authoritatively construed the reach of the definitional sections holding, over argument to the contrary, that these sections extend to the limits of their literal breadths. These authoritative constructions were ignored by the District Court when it passed on the issues below.

In *Nostrand v. Balmer, supra*, counsel for respondent-professors argued, among other contentions, that the sweep of the definitional sections of the Act, incorporated into the oath, abridged the professors' freedom of speech and assembly as they are protected by the First and Fourteenth Amendments to the Constitution of the United

States. (Brief of Respondents, pages 43-59; *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477). Counsel for respondent-professors, citing *Sweezy v. New Hampshire*, 354 U.S. 234, urged that the Washington Supreme Court construe the Washington Subversive Activities Act in a manner similar to that employed by this court, with reference to the Smith Act, in *Dennis v U. S.*, 341 U.S. 494, and *Yates v. U. S.*, 354 U.S. 298. (Brief of Respondent, pages 39-43). However, the Washington court refused so to limit the applications of the definitional sections of the Washington Subversive Activities Act.

On remand, in *Nostrand v. Little, supra*, the breadth of the definitional sections was not in issue, this court having remanded that case solely on the question whether, before their dismissal for refusal to execute the required oaths, professors were entitled to a hearing where they might explain or justify their refusal to sign. However, the Washington State Supreme Court, *sua sponte*, discussed the breadth of the Washington statutes and compared them with the breadth of Arkansas statutes which had been found, by this court, to be unconstitutionally broad because the statutes asked of Arkansas teachers more than that necessary to effectuate the state's legitimate interests. *Shelton v. Tucker*, 364 U.S. 479. The Washington court held that "[un]like the Arkansas statute, our Act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130.

The 1955 amendment, in issue in this case, to the 1951 Subversive Activities Act provides that "refusal to answer on any grounds shall be cause for immediate termination

of such employee's employment or for a refusal to accept his or her application for employment." This statute likewise has been authoritatively construed by the Washington State Supreme Court. (For a history of the prior litigation of this statute, see the pre-trial order, hereinafter abbreviated as P-T.O., at pages 81 to 84.) In an earlier case, the Washington Supreme Court held that neither the 1955 amendment, nor the 1951 Subversive Activities Act, affords professors a hearing where they might explain, defend or justify their refusal to take the oath. *(Nostrand v. Little,* 58 Wn.(2d) 111, 132, 361 P.(2d) 551, 564.) In addition, the Washington Supreme Court held, over argument to the contrary, by the attorney general, that Washington's model state administrative code (Chapter 234, Laws of Washington, 1959, RCW 34.04.010 et seq.) does not entitle professors at the University of Washington to a hearing should they refuse to execute the oath; the model administrative code of 1959 "was not intended to supersede established procedure adopted by the regents . . . there is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years." *(Nostrand v. Little,* 58 Wn.(2d) 111, 132, 361 P.(2d) 551, 564.) But, the Washington Supreme Court did declare that, if a professor should refuse to execute the oath, then, before dismissal, he "will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations . . ." *(Nostrand v. Little,* 58 Wn.(2d) 111, 131, 361 P.(2d) 551, 563.)

Under the provisions of Chapter 25 (Exhibit No. 3) of the administrative code governing the University of Washington at the time of the decision in *Nostrand v. Little, supra*, a full-time member of the faculty had tenure if "he is a professor or associate professor . . ." or if he has held any full time faculty rank continuously for six years, and certain other minor categories not here important. Holding of tenure means that "no faculty member having tenure as defined . . . shall be removed from his position or subjected to discriminatory reduction of salary until he has been given opportunity for a hearing . . .". (See Chapter 25 of the Administrative Code of the University of Washington found in Appendix to *Nostrand v. Little, supra.*) The tenure provisions of the administrative code of the University of Washington do not apply evenly to all academic positions below the rank of associate professor; thus, many assistant professors, most instructors, and all lecturers, pre-doctoral associates, teaching fellows, and all members of the faculty on acting or visiting or research appointments, etc. do not have tenure and are not entitled to a hearing before their discharge for failure to execute the disclaimer oath as required by the 1955 amendment to the Washington Subversive Activities Act of 1951.

Administrative Rulings with Regard to Tenure

Washington law expressly vests final control over the university in an administrative board, the University's Board of Regents, providing that (RCW 28.77.130):

> "The Board of Regents shall:
> (1) Have full control of the university . . . and

employ members of the faculty who shall hold their positions during the pleasure of the board of regents; . . ."

At its meeting on May 25, 1962, and after the decision of the Washington State Supreme Court in *Nostrand v. Little, supra*, the Board of Regents of the University of Washington, making specific reference to the 1955 amendment and to the 1951 Subversive Activities Act, changed the administrative code governing the tenured faculty members of the University of Washington. The Board ruled that a new ground for dismissal of tenured faculty members had been added to the administrative code: to wit, failure to execute the oaths here in question as required by State law. The relevant minutes of the May 25th meeting, pages 16-17, reveals that the Board of Regents ruled that:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with provisions of Washington state law which is binding upon the Board of Regents."
>
> . . .
>
> "They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, *maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the state of Washington.*" (emphasis in original)
>
> "In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the cus-

toms of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the state of Washington and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath." (The relevant portions of the Minutes of May 25, 1962, appear in Appendix C, attached hereto; also see pre-trial order pp. 85-87).

The responsibilities and obligations of the Board of Regents in relation to the disclaimer oath are imposed by the laws of the State of Washington—one of them is in question in this case—Chapter 377, Laws of Washington, 1955. This law directs that the Board of Regents "shall require of every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party, or other subversive organization and refusal to answer shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070). Another statute, found in the 1951 Subversive Activities Act, Chapter 254, Laws of Washington, 1951, Section 14, requires that employees make written statements under oath; it provides further responsibilities and obligations of the Board of Regents that "Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged."

On May 28, 1962, after the Board's change in the Administrative Code regarding tenure, and upon advice from defendant John J. O'Connell, Attorney General for the State of Washington, defendant Charles E. Odegaard,

President of the University of Washington, acting upon the direction of defendant regents, demanded that each and every employee of the University of Washington, including all members of the faculty, alien and citizen, tenured and non-tenured, execute an oath form, either form A or B, which would satisfy the requirements of the above described statutes as they may apply individually to each employee. (See Appendix B and P-T.O. 77-78, 84, 85-87, and 91). Oath forms A and B were distributed (P-T.O. 97) and demands were made upon all employees, faculty and non-faculty, to execute them; whereupon, some employees did execute said oath forms and other employees, appellants here, and others similarly situated, resisted. (Exhibits 16 and 17). Oath form A, applying to the teaching faculty, carries two oaths, and was designed to satisfy the oath requirements of both Washington statutes involved in this case. Oath form B, applying to non-faculty, non-teaching employees, carries an oath designed solely to satisfy the requirements of the 1955 statute (Appendix B).

This suit, a class action under Rule 23 (a) of the Federal Rules of Civil Procedure was instituted on June 6, 1962.

The University of Washington

The University of Washington is older than the State of Washington, and is one of two state universities. It is located primarily in Seattle, Washington. It employs many thousands of persons, and it offers academic, scientific, research and professional education in numerous fields to more than 25,000 persons annually (P-T.O. 1). The budget

of the University derives about 60% from funds appropriated by the legislature of the State of Washington with the remaining 40% coming from diverse sources, the second largest percentage, 21%, coming from the federal government and private contract research. In recent years, this second category of funds has been increasing in its percentage share of the total University budget (P-T.O. 2). That the University is one of our great institutions of higher learning and creative research in the United States is revealed by the activities it undertakes through its fifteen schools or colleges: The Graduate School; The College of Architecture and Urban Planning; The College of Arts and Sciences; The College of Business Administration; The College of Education; The College of Engineering; The College of Fisheries; The College of Forestry; The School of Nursing; The College of Pharmacy; The School of Social Work; The School of Librarianship; The School of Law; The School of Medicine; and The School of Dentistry. The anticipated future of the University is one of growth and expansion of students and faculty. It is expected that the University increasingly will become a center for graduate and advanced professional work, although retaining its commitment to a strong undergraduate program (P-T.O. 93). The educational and research activities of the University of Washington are fully described in the pre-trial order at pages 1-69.

Appellants

Appellants in this case are sixty employees of the State of Washington, employed in various capacities at the University of Washington (P-T.O. 70-74). At least eleven

of them earn a salary in excess of $10,000 annually (P-T.O. 89). Most of the appellants, including three tenured professors who are aliens, are tenured members of the faculty. Most appellants serve the University in both professorial and research capacities. Some appellants are faculty members without tenure, but some have been hired on renewable three-year contracts (exhibits 9 and 15), and the remaining appellants are non-tenured, non-teaching members of the University staff—some serving as research associates; one as a micrometeorologist; another is an assistant editor of the University of Washington Press; two are secretary-typists, and another is a detailer in the cyclotron department.

The professorial appellants have been members of the University of Washington faculty from one to thirty-three years. They serve in many different schools and departments within the University and have distinguished themselves, and the University of Washington, in many respects: e.g., Born in Europe, Professor Z. W. Birnbaum, professor of mathematics, is Director of the University's Laboratory of Statistical Research. Dr. Birnbaum has been employed by the University for 24 years and is an international scholar. His original education took place in Poland, and he later taught mathematics at the University of Lwow, Poland. (See deposition pp. 1-3, P-T.O. 132). Professor Birnbaum engaged in post-doctoral study at the University of Goettingen, Germany. In addition to having been educated in mathematics and law in Europe, he has done mathematical research in the United States, and has received various fellowships, including a Guggen-

heim grant, which enabled him to carry out further studies. (See deposition 4-5, P-T.O. 132). Dr. Birnbaum has published one book, more than forty original research articles, plus a large number of other publications, such as book reviews, critiques, etc. (deposition 5). He is a member, and attends meetings, of many organizations limited to American membership, such as the American Mathematical Society and the Mathematical Association of America (see deposition 6-7). In addition, he is a member, and attends meetings, of international organizations, such as the International Congress of Mathematicians and the Institute of Mathematical Statistics (deposition 9,13). Professor Birnbaum attends these meetings as an official delegate from the University (deposition 12). His membership in these organizations is a necessary part of his professional duties (deposition 11, 38-40), and his attendance at the International Congress of the Institute of Mathematicians is additionally sponsored by the U.S. Office of Naval Research (deposition 12). These associations and meetings bring Professor Birnbaum, and others similarly situated, together with scholars from throughout the world, including communists who come from the Soviet Union and other Iron Curtain countries such as Poland, Hungary and Czechoslovakia. The communist scholars who attend these meetings can be expected to be interested in furthering the goals of the communist regime (deposition 20-22). At these meetings, and elsewhere, Professor Birnbaum associates with some of the most outstanding Russian mathematicians (deposition 10). In addition, he is the President-Elect of one of these international organizations, the Institute of Mathe-

matical Statistics, and his work, as its officer, would require that he come into contact with, further the interests of, and aid, advise and teach, other scholars, including communist scholars from the Soviet Union, and other Iron Curtain countries, and, including further, giving aid and assistance to those communist scholars who are seeking information, and who seek to visit other countries, and who contemplate visits to the United States (deposition 10-27). It is entirely feasible that the assistance, aid, guidance and teaching, that Professor Birnbaum renders to Soviet scholars, and other communist scholars, could be used by the Soviet Union government for military purposes (deposition 19, 17), just as the United States government could, and does, use the information which it obtains from Professor Birnbaum. Professor Birnbaum cannot execute the required oaths and continue to engage lawfully in these associations and activities, particularly in those academic and professional activities necessary for the assimilation of international up-to-date research findings and of transmitting them to his colleagues and students (deposition 22, 34, 40-41, 52-53). Professor Birnbaum fears that, were he to execute the oaths, then he might be found to be engaging in "subversive activities" or to be a "subversive person" (deposition 34) and further, he fears the threat of perjury (deposition 35 and 53).

Dr. Paul Dietrichson, an associate professor, is a Norwegian citizen. His major field of study is philosophy, particularly existential philosophy and the metaphysical foundations of ethics (P.T.O. 119). Dr. Dietrichson has pub-

lished articles and reviews in American and European journals and presently is the recipient of a grant from the David Swenson-Kierkegaard Memorial Fund to write a book on Kierkegaard's philosophy. He has published one book, Introduction to Philosophy. An alien, Professor Dietrichson refuses to execute the demanded oaths (P-T.O. 119-121).

Dr. Boris A. Jacobsohn is Director of the Summer Institute for Theoretical Physics at the University of Washington and is a senior faculty member in the Physics department (P-T.O. 101). Dr. Jacobsohn is an internationally known scholar, having collaborated on fundamental matters of physical theory, in mutual teaching, aid, advice and cooperation, with Dr. R. M. Ryndin of the Joint Institute for Nuclear Research, Dubna, Soviet Union. Their collaborative articles appear in 6 Physical Review Letters, No. 1, Jan. 1, 1961, and 24 Nuclear Physics 505-509 (1961) (P-T.O. 99). Professor Jacobsohn expects to continue in these types of associations, but cannot execute the required oaths and engage in the type of activities described above. However, his continued participation in this type of activity is essential to his calling as a Professor of Theoretical Physics (P-T.O. 99-100).

Dr. Rhoads Murphey is professor of Geography and is a member of the Far Eastern and Russian Institute at the University of Washington. He has published a textbook, An Introduction to Geography (1961), and is the Editor of the Journal of Asian Studies, which is devoted to research in the humanities and social sciences concerned with Asia (P-T.O. 113). In his latter capacity, and as a

scholar in his field, Dr. Murphey is responsible for aiding, advising and teaching scholars throughout the world, including Communist academicians from the Soviet Union and Communist China. He must, and does, associate with them in foreign organizations. Dr. Murphey is a member, and attends meetings, of the International Congress of Orientalists which brings him into direct contact with international scholars, some of whom are Soviet and, more particularly, Chinese communists, and where Dr. Murphey engages in frequent meetings and discussions with them (P-T.O. 112). Were Professor Murphey to sign the oath, he could no longer participate in these necessary associations, nor could he "discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses" in which he teaches and of the fields of academic exploration in which he works (P-T.O. 112).

Dr. W. Stull Holt is a professor of American History, and American Foreign Policy, having served the University of Washington since 1940, and having been chairman of that department for fifteen years (P-T.O. 105). Dr. Holt is the author of eight books and many articles. He has distinguished himself, and the University of Washington, in many additional ways, holding such titles as Advisor to the Officer of the Chief of Military History; Councilman of the American Historical Society; President of the Pacific Coast Branch of the American Historical Society, etc. Dr. Holt has served the United States in two World Wars, being decorated in World War I with

the American Silver Star and the French Croix de Guerre, and in World War II with the American Bronze Star and the British O. B. E. (Officer of the Order of the British Empire) (P-T.O. 105). Professor Holt refuses to sign oath Form A because were he to sign, then he would either have to violate his oath, thus risking the penalties of loss of employment, perjury, and abridging his conscience, or he would have to abide by his oath and inject the required, but historically incorrect, doctrines into his teaching, and make numerous changes in both his scholarship and attitudes, and in his public and private expression of his political and related views (P-T.O. 108).

Dr. Melvin Rader is a professor of social and moral philosophy and aesthetics, and has, with distinction, served the University of Washington and the academic community for thirty-three years. Dr. Rader is an internationally known scholar and author, being highly respected for such books as: A Modern Book of Esthetics (3rd ed. 1960); No Compromise (1939); Ethics and Society (1950), and The Enduring Questions (1956). He will publish another book, Ethics and the Human Community in 1963 (P-T.O. 115-116). Additionally, Professor Rader has authored articles, or parts of books, such as "Soviet Communism" found in Twentieth Century Political Thought (1946); "The Moral Basis of Peace" and "International Protection of Individual Freedom Within the State" in If Men Want Peace (1946); "Soviet Ideals and Postwar Cooperation" in Mosse, Soviet Far East and Pacific Northwest (1944), and "On Teaching Communism in the Public Schools," U. of W. College of Education

Record, May 1962 (P-T.O. 115). Since Dr. Rader is professor of social and moral philosophy he open-mindedly must deal directly with the original source materials of Communist thought and ideology. He frequently studies, and he requires that his students read, and master, such items as Marx's, The Communist Manifesto, and The German Ideology, and Lenin's, The State and Revolution.

In addition, Professor Rader has been a member of several organizations which seemed to have justified, in the minds of some, an investigation, in 1948, of Professor Rader by the Washington Committee on Un-American Activities. After its investigations, the Committee charged him, in a unanimous report to the 31st Washington Legislature, January, 1949, with having committed perjury before it, and with having been closely associated with twelve organizations which had been officially cited as Communist fronts and subversive (P-T.O. 117). Subsequent investigations by University of Washington President, Raymond Allen, and others, proved beyond all doubt that the charges of Washington's Committee on Un-American Activities were absolutely false and without foundation, and Professor Rader, in a libel suit, later collected damages from the chairman of that committee, Mr. A. F. Canwell. A Report of the Rader Case appears in Countryman, Un-American Activities in the State of Washington (1951) (P-T.O. 116-118).

There can be no doubt of Professor Rader's commitment to the Constitution of the United States and its Bill of Rights, and he has twice been chairman of the American Civil Liberties Union of Washington (P-T.O. 118).

Nevertheless, several facts remain: three sworn witnesses impinged upon his truthful testimony; an official committee of the State Legislature unanimously charged him with false swearing; a New York judge asserted that Professor Rader should be the subject of a grand jury investigation; his reputation was clouded; Professor Rader's academic employment was in jeopardy for a year, and his credit rating fell (P-T.O. 118).

The attacks made upon him are not events of the remote past, but continue to the present day, due, in part, to the past record. Professor Rader has continued to be the subject of recent attacks, made by newspaper and otherwise, to the effect that he is still a member of communist front organizations; that he continues to hew to the communist party line, and that he is a master of deceit, each of which is false. Professor Rader cannot sign the oaths, because, were he to do so, then, it is not at all unlikely that he would be charged with perjury (P-T.O. 118).

It would unduly lengthen this statement to review the history of each remaining appellant. They have distinguished themselves in many ways, bringing scholarly respect to the University of Washington. For many of them, the performance of their academic duties necessarily brings them into close collaboration and association with communists, and they frequently teach, advise and aid communists in many ways, and by many means, some of which may very well help the Soviet Union and Communist China achieve their military and other purposes. A few of the many achievements and academic distinc-

tions, along with several of their necessary associations with communists, do appear in the pre-trial order (e.g., see Drs. Wilcox, Dawson, Fleagle, English, and Keller. P-T.O. 102-104 and Professor Valentine at pages 107-109).

Two appellants, Drs. Matchett and Orians, and others similarly situated, are members of the religious order known as the Society of Friends (Quakers) (P-T.O. 100). They refuse to execute the oaths on religious grounds which are protected by the First Amendment to the Constitution of the United States of America.

Additional Operative Facts

It has been expressly agreed and stipulated that at all times material to the issues in this case, appellants, and others similarly situated, have refused to sign all oath forms which have been demanded of them and continue to do so; that appellants, and others similarly situated, have no speedy or adequate remedy at law, and that "unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants) and others similarly situated, will suffer irreparable injury not compensable in monetary damages" (P-T.O. 87).

Appellees, defendants below, are members of the Board of Regents, Charles E. Odegaard, President of the University, and John J. O'Connell, Attorney General for the State of Washington.

Since the 1955 statute, in question in this suit, was enjoined for seven years from 1955 to 1962, appellees dur-

ing that time required no oaths, either the oath required by the 1955 or 1931 statute, of any employee, and none was administered to employees of the University of Washington (P-T.O. 81-84). During that time, and to the present, the appellees, Board of Regents, President of the University and the Attorney General, have been and are without knowledge that any University of Washington faculty member, students, graduates or ex-students or any guest, visitor or listener to public lectures at the University of Washington has been charged in any judicial proceeding brought under the Washington Subversive Activities Act (P-T.O. 98).

Additionally, no official agency of government, local, state or federal, has brought facts to the attention of any of the appellees that, as a result of the teachings and activities of appellants, and others similarly situated, any student or ex-student of the University is in violation of Washington's Subversive Activities Act, and further, appellees are without knowledge that any appellant, or others similarly situated, in any way, uses his position of employment to engage in or promote activities designed to achieve the violent overthrow, by force, of national or state governments (P-T.O. 98-99).

Dr. Charles E. Odegaard, President of the University of Washington, stated that oath forms A and B (absent statutory requirements) are not necessary qualifications of fitness to teach or to do research at the University of Washington; that the existing recruitment and personnel procedures practiced at the University during the past seven years, as improved from time to time, are adequate

to protect the legitimate public interest in securing qualified and trustworthy personnel, and that some qualified applicants for academic positions have been reluctant to accept employment on the condition of executing oath forms A or B.

Glenn Leggett, Vice Provost of the University of Washington, is in charge of supervising academic personnel records. He stated that a physicist who previously had been hired by the University of Washington, resigned, accepting a position at the University of Birmingham [Birmingham-Southern at Birmingham, Alabama], when informed that execution of the oaths, required by the statutes here in question, were conditions precedent to academic employment; that, in 1962, after dissolution of the injunction in *Nostrand v. Little, supra*, and the resumption of the oath requirements, several executive officers of the University indicated to him that the University would be less successful in its academic recruitment policy, and further, that one professor who was then negotiating an academic appointment with the Department of Philosophy, refused a position at the University of Washington because, in part, he would have to execute the oaths in issue in this case before he could qualify for academic employment as a philosopher (P-T.O. 97).

In accordance with the facts of their knowledge, appellants can testify that they have not, and do not, use their positions of employment at the University of Washington in any such ways as knowingly to bring about violent overthrow, by force, of state or national governments (P-T.O. 88). Furthermore, each appellant is of the con-

viction that if he were to execute the required oaths, then he would suffer emotional anguish and would have to compromise his principles, beliefs and consciences; that he may subject himself to harassment, and further, to the threat of loss of employment and/or prosecution for perjury, and that the demands of the State of Washington that he sign the oaths in question are affronts to his personal and professional integrity, and that they constitute an abridgement of his civil liberties and constitutional rights secured and guaranteed under the Constitution of the United States of America (P-T.O. 99).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial in that they directly raise fundamental constitutional issues with respect to the power of state legislatures, as a condition of continued employment, and without affording a hearing, to compel all faculty members, tenured and non-tenured, alien and citizen, and all other employees, who are now employed and otherwise fully qualified for their positions at a state university, to execute two broad and vague oaths, each of which abridges the faculty members' and other employees' constitutional freedoms protected by the Constitution of the United States. Affecting the nature and role of a free university in our society, academic freedom, and the constitutional rights of state employees and faculty members, the problems involved in this case are of an equally significant or greater magnitude than those considered on appeal by this Court in cases involving state promotion of patriotism or state loyalty programs: e.g., *West Virginia v. Barnette*, 319 U.S. 624;

Garner v. Bd. of Pub. Wks., 341 U.S. 716; *Adler v. Bd. of Ed.*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Ed.*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234; *Beilan v. Bd. of Ed.*, 357 U.S. 399; *Lerner v. Casey*, 357 U.S. 468; *Speiser v. Randall*, 357 U.S. 513; *Nelson v. Los Angeles*, 362 U.S. 1; *Shelton v. Tucker*, 364 U.S. 479; *Konigsberg v. California*, 353 U.S. 252 and 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82; and *Cramp v. Florida*, 368 U.S. 278. The constitutional issues here presented, particularly the First Amendment issues, have not been considered and set to rest by this Court. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234 and *Garner v. Bd. of Pub. Wks.*, 341 U.S. 716.

As to all questions here presented the United States District Court, Western District of Washington, Northern Division, upheld the state statutes against serious and substantial claims that they were, and are, repugnant to certain provisions of the United States Constitution. The validity of each of these claims, and the substantial nature of the issues raised in this appeal, are considered below. The questions will be discussed seriatim, except that those questions presenting common problems will be discussed as a unit. Hence, questions A-1a, b, c and d, which present common First Amendment problems, will be discussed under roman numeral I; questions 5 and 6 under roman numeral VII, and questions 8 and 9 will be discussed together under roman numeral IX.

I.

The Court Below Upheld the Penalization of All Advocacy of the Prohibited Doctrines and All State Prohibitions on Membership Whether or Not the Restrictions Prevented Any Evil, Thereby Depriving Appellants, and Others Similarly Situated, of Freedoms of Thought, Privacy of Conscience, Religion, Speech, Association and Assembly, Without Due Process of Law in Violation of the First and Fourteenth Amendments to the Constitution of the United States.

In no case has this Court fully explored and adjudicated the question as to the exact point at which the First Amendment, through the Fourteenth, operates as a limitation upon state authority to compel state employees, particularly faculty members, to execute oaths as conditions of their continued employment at a university. Although a somewhat similar question was presented in *Garner v. Bd. of Pub. Wks.*, 341 U.S. 716, this Court did not explore and adjudicate the First Amendment question presented by this case. In *Garner*, this Court considered only the Bill of Attainder and *ex post facto* aspects of the Oath. This Court assumed that knowledge was part of the *Garner* oath and did not consider, nor adjudicate, whether knowledge alone insulates every oath from infringing upon First Amendment freedoms. Subsequent cases indicate that knowledge alone is not sufficient. *Speiser v. Randall*, 357 U.S. 513; *Shelton v. Tucker*, 364 U.S. 479, and *Cramp v. Florida*, 368 U.S. 278. Thus, there is need to reconcile these cases and to locate the point at which the First Amendment operates as a limitation on state power to require oaths as a condition of state employment. This question is cleanly brought to issue in this case which un-

equivocally pits the First Amendment claims to freedom of religion, free speech and private association, including academic freedom, by faculty members and other employees, at the University of Washington, against the requirement that, as a condition of their continued employment, all members of the teaching faculty must execute two required oaths, and that all other employees must execute one of the two oaths.

This Court's disposition in *Gerende v. Bd. of Supervisors*, 341 U.S. 56, does not foreclose this appeal because *Gerende* did not present the issues which are presented by this case. In *Gerende* this Court affirmed the judgment of the Maryland Court of Appeals on the understanding that "a candidate need only make oath that he is not a person who is engaged in one way or another in the attempt to overthrow the government by *force or violence*', and that he is not knowingly a member of an organization engaged in such an attempt." This Court did not have before it the much broader and pervasive Section 15 of Maryland's Ober Act which defined a "subversive person" in language identical to that involved in this case. The Maryland Court had held that Section 15 did not apply to *Gerende*, *Shub v. Simpson*, 76 A.(2d) 332, at 341, thus the questions presented in this case have not been prejudiced by *Gerende*.

Nor do the employee dismissal cases foreclose the issues presented here. In *Beilan v. Bd. of Ed.*, 357 U.S. 399, a public school teacher was discharged for "incompetency" under § 1122 of the Pennsylvania Public School Code, because of his refusal, continued after a warning that failure

to answer might lead to his dismissal, and after a hearing, to answer a question of his superintendent as to his membership in the Communist Political Association. This section of the Pennsylvania Code was not in issue in *Beilan*; whereas the Washington statutes are in issue in this case. But, more importantly, the procedures in *Beilan* were designed for identification and informational purposes only and not for exclusionary and dismissal purposes as are the Washington oaths. Thus, in *Beilan* the question before this Court was whether *Beilan* could be discharged for blocking a legitimate inquiry of the state for identification and informational purposes. There is nothing in *Beilan* that holds that a state may discharge a person because he reveals that he is a member of the Communist Political Association. However, the case at bar does not present appellants with the middle ground of *Beilan* where they might give the demanded information and retain employment. A person must execute the oaths, questioned in this case, in order to be eligible for state employment; thus, the statutes here function to exclude employees from continued state employment, and they do so without a meaningful hearing, present in *Beilan*, where appellants might explain or justify their refusal to execute the oaths. Furthermore, the oaths here present a broadside attack on First Amendment liberties, going well beyond the simple question put to *Beilan* (see infra). Thus, in their breadth and in their broadside manner of infringement, the oaths demanded of appellants raise substantial questions under *Shelton v. Tucker*, 364 U.S. 479, a case not decided at the time of the *Beilan* decision. Also, *Beilan* did involve a selective and less drastic approach to the problem than do

the oaths in this case. For these same reasons *Lerner v. Casey*, 357 U.S. 468, and *Nelson v. Los Angeles*, 362 U.S. 1, do not prejudice the questions presented in this appeal.

Other cases, such as *Konigsberg v. California*, 353 U.S. 252 and 366 U. S. 36, and *In re Anastaplo*, 366 U.S. 82, do not decide the issues presented in this case for many of the same reasons discussed above with reference to *Beilan*. But, in addition to those reasons, there is another. This Court has clearly indicated that there is a difference between a state offering a "privilege" and a state legislating conditions of state employment. *Konigsberg* and *Anastaplo* were decided on the theory that bar admission was a privilege:

> "Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications . . ." *(In re Anastaplo*, 366 U.S. 82 at 90.)

This Court, subsequent to *Adler v. Bd. of Ed.*, 342 U.S. 485, has clearly indicated that state employment does not fall into the "privilege" classification. *Wieman v. Updegraff*, 344 U.S. 183 at 192; *Torcaso v. Watkins*, 367 U.S. 488 at 495-96, and *Cramp v. Florida*, 368 U.S. 278.

However, as noted above, *Adler, supra*, was decided, in part, on the now discredited "privilege-of-state-employment" reasoning, and hence, either it loses much of its vitality, or the conflict in the opinions of this Court on this point indicate that the case at bar presents a substantial federal question. Furthermore, *Adler* was decided before this Court fully recognized constitutional protection for the right to private association, *NAACP v. Alabama*, 357

U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516, relied upon here by appellants, thus *Adler's* holding that unexplained membership in a "subversive organization" might qualify as grounds for the dismissal of a teacher has been seriously impaired by this Court's cases subsequent to *Adler*.

In addition, *Adler's* holding does not foreclose this appeal because *Adler* was decided within the framework of viewing the state as a seeker of information, i.e., identification, a legitimate state purpose, and provision for a meaningful hearing was afforded to the teachers. As pointed out above, Washington's oaths do not serve the purpose of information, i.e., identification, but rather, they are exclusionary, locating a class of persons who are eligible for employment, or continued employment, and locating them on the basis of their beliefs, speech and associations. No meaningful hearing is afforded in the case at bar. Finally, *Adler's* rationale and holding have been seriously undermined by two subsequent decisions of this Court; *Wieman v. Updegraff*, 344 U.S. 183, and *Speiser v. Randall*, 357 U.S. 513, and by the fact that *Adler* followed precedent *(Garner)* which was not in point. *Adler* decided that unexplained membership in a "subversive organization" might qualify a teacher for dismissal. This means that the teacher is considered as being a member of a subversive organization, and if he refuses to explain his membership, the question was whether he can be discharged. In *Adler*, the teacher was held to be a member of the organization, and, at page 492, this Court cited *Garner v. Bd. of Public Works, supra*, for its precedent on this point. However,

Garner, at page 720, expressly said:

> "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation [in the Communist Party, U.S.A.] justifies his discharge."

Thus, it is clear then, in another respect *Adler* is defective, and cannot be relied upon to govern the issues presented in this case.

It should be pointed out that when an earlier case, involving two tenured professors who questioned the 1955 oath statute, was on appeal from the Washington Supreme Court and was before this Court, it noted probable jurisdiction, believing a substantial federal question to be presented *Nostrand v. Balmer*, 361 U.S. 873. After briefs, hearing and oral argument on the merits, this Court invoked the principle of comity, and remanded that case for a determination whether the 1955 oath statute, in question here, afforded a hearing to tenured professors at the University of Washington. *Nostrand v. Little*, 362 U.S. 474. On remand, the Washington Supreme Court held "that the professors are not entitled to a hearing under § 15 of the 1951 act, but, as stated above, are entitled to a hearing before the tenure committee, because the rules and regulations adopted by the regents (which form a part of their contracts of employment) so provide." *Nostrand v. Little*, 58 Wn.(2d) 111 at 132. On re-appeal, this Court, over dissent, held that "the appeal is dismissed for want of a substantial federal question." *Nostrand v. Little*, 368 U.S. 436.

After the dismissal for want of a substantial federal

question, the tenure code of the University of Washington was amended by the Board of Regents, adding another ground for dismissal of tenured faculty: failure to execute the oaths in question in this case. Thus, the hearing afforded by the tenure code to tenured faculty members becomes a sham and a nullity. Furthermore, this case, a class action, presents also the interests of non-tenured faculty members not present in *Nostrand v. Little, supra,* who expressly receive no hearing under the tenure code, but some of whom have renewable three-year contracts, thus distinguishing their interest from that of Globe in *Nelson v. Los Angeles*, 362 U.S. 1. This case also involves the interests of other state employees and students at the University of Washington. In addition, this case presents for adjudication an oath, the 1931 oath, not involved in *Nostrand v. Little, supra,* and it is undisputed that the 1931 statute clearly does not afford anyone a hearing before dismissal. Thus, given the nature of this case, we submit it is not controlled by the ruling in *Nostrand v. Little, supra,* dismissing for want of a substantial federal question. To the contrary, we submit this case presents many substantial federal questions, some of which were presented, but not decided, in *Nostrand v. Balmer, supra,* where this Court noted probable jurisdiction.

Discussion of Issues

It is clear that the Washington legislature has no power under the First and Fourteenth Amendments to require, as a condition of state employment, that all state employees execute oaths that either they are, or are not, Jews, Catholics or Protestants, or execute oaths that either they are, or are not, members of the Republican or Democratic

parties, or execute oaths that either they do, or do not, advocate, abet, advise or teach by any means the desirability of governmental subsidization of contraceptives as a means of population control. Such oaths, as conditions of employment, would obviously contravene the mandate of the First Amendment, even though, like the Washington oaths, they carried the requirement of knowledge. Wherever this Court may draw the line as to the exact point at which the First Amendment does operate as a limitation on state authority, we submit that the legislature of the State of Washington has over-stepped that boundary line in this case.

The effort by the Board of Regents of the University of Washington to carry out their statutory duties and to force appellants, and others similarly situated, to execute the two oaths, which abridge fundamental liberties, on the pain of loss of their academic employment for which they have spent many years preparing themselves, raises squarely issues of freedom of speech and association in one of its most significant and sensitive aspects—the area of academic freedom. In essence, the attempt of the Washington legislature brings potent sanctions to bear upon the beliefs and attitudes of faculty members, curtailing and repressing academic inquiry and discussion, as well as political association. Such conduct on the part of a state government runs directly counter to the principles of free conscience, discussion and association which underlie our democratic form of government and which are embodied in the First and Fourteenth Amendments as consistently interpreted by the decisions of this Court.

The free exercise of the constitutionally protected free-

doms of religion, speech, private association and academic freedom of appellants, and others similarly situated, will be substantially interfered with, and materially abridged, by the statutory requirements that appellants, and others similarly situated, execute the oaths as a condition of continued employment. This invasion of protected liberties is an uncontested and admitted fact:

> "Unless defendants are restrained from enforcing provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants), and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (P-T.O. 87.)

The undoubted encroachment upon appellants' free exercise of the above liberties is further corroborated by the statements of Professors Holt (P-T.O. 105), Valentine (P-T.O. 107), Read (P-T.O. 110), Murphey (P-T.O. 112), Rader (P-T.O. 115), Dietrichson (P-T.O. 119), and Wilcox, Dawson, Fleagle, English and Keller (P-T.O. 101-102) plus the deposition of Professor Z. W. Birnbaum. Of the infringement upon, and deterrence of, protected liberties there can be no question.

The power of the legislature to require oaths from state employees, including university professors, fully as much as the power of legislative investigation (*Sweezy v. New Hampshire*, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539), must, at some point, be checked by the countervailing command of the First Amendment. This Court has consistently taken the position that state power is subject to such limitations, and it repeatedly has held that a state does not have power to enact any type of oath it could

conceivably choose. For example, a state has no power to require oaths, as conditions of employment, which do not carry a requirement of knowledge (*Wieman v. Updegraff*, 344 U.S. 183); nor does it have power to prescribe oaths, which, although requiring knowledge, are, nonetheless, vague and not susceptible of objective measurement (*Cramp v. Florida*, 368 U.S. 278); nor, significantly for this case, does a state have power to require certain statements, made under oath, from teachers which "broadly stifle fundamental personal liberties when the end can be more narrowly achieved," although the knowledge requirement might be present, and although the governmental purpose might be "legitimate and substantial." (*Shelton v. Tucker*, 364 U.S. 479 at 488.) We submit that the Washington legislature in this case has broadly encroached upon fundamental liberties, contrary to the First Amendment's limitation on state power, and that the state's legitimate interest could more narrowly be achieved by using procedures which are already in existence, without recourse to the statutes requiring the two oaths.

No one questions the power of a state legislature, subject to overriding federal power, to enact legislation prohibiting acts of violence to overthrow, destroy or alter constitutional forms of government. Furthermore, under *Dennis v. U.S.*, 341 U.S. 494, a state may proscribe the direct advocacy of immediate force or violence for such purposes, whether by individuals or by organizations. The Washington legislature, in 1909, exercised this power and enacted Washington's criminal anarchy and sabotage statutes (RCW 9.05 et seq.), not in issue here. The power of the

state extends to these areas, and Washington's criminal anarchy and sabotage statute occupies these areas fully. But, the state clearly has no power, by reason of the First and Fourteenth Amendments, to prohibit, or unduly burden, by way of oath, or by way of defining a crime, academic or political activity, association or discussion which is directed toward political or social change through peaceful, democratic methods. *Stromberg v. California*, 283 U.S. 359; *De Jonge v. Oregon*, 299 U.S. 353; *Taylor v. Mississippi*, 319 U.S. 583; *Terminiello v. Chicago*, 337 U.S. 1; and see *Sweezy v. New Hampshire*, 354 U.S. 234; *NAACP v. Alabama*, 357 U.S. 449; *Speiser v. Randall*, 357 U.S. 513; *Bates v. Little Rock*, 361 U.S. 516; *Shelton v. Tucker*, 364 U.S. 479; *NAACP v. Button*, 371 U.S. 415, and *Gibson v. Florida*, 372 U.S. 539.

Nor does a state have any power to prevent academic discussions of political and social issues, even where those discussions may directly relate to the doctrines of bloody revolution, force and violence. *Dennis v. U.S.*, 341 U.S. 494, at 501-2. This Court has drawn a sharp line between advocacy of forcible overthrow and the incitement of action to that end. *Yates v. U.S.*, 354 U.S. 298. Nor does a state possess constitutional power to prohibit or forbid knowing, but inactive, membership in the American Communist Party. Such membership might be held by one who is foolish, deluded or optimistic, but he cannot be made a criminal because of it. *Scales v. U.S.*, 367 U.S. 203 at 229-30. Counsel submit that a person, other than members of the F.B.I., could also be a member of the Communist Party for purposes of studying it and for the scholarly pur-

pose of obtaining first-hand information about its character and social significance in our society.

State power to legislate in these areas, including legislative prescription of oaths, with their enormous capacity for restraint and suppression, is excluded because "where the First Amendment applies, it is a denial of all governmental power in our federal system." *Marsh v. Alabama*, 326 U.S. 501 at 511. The State, even as an employer, is still subject to the requirements of the Constitution.

Yet, it is precisely these constitutionally forbidden areas that the Washington legislature seeks to invade when it demands that, as a condition of continued employment, appellants, and others, execute the oaths here at issue.

A. The Breadth of the Oaths Here in Issue Affects the Rights and Liberties of All State Employees, Particularly Those of Professors and Socially Conscious Organizations.

The extent of the invasions of liberty can be measured by the sweep of the various statutes which serve to define the oaths.

The Unconstitutional Breadth of the 1955 Disclaimer Oath

It is important to remember that the Washington State Supreme Court has carefully reviewed the sweeping breadth of the statutes defining the 1955 disclaimer oath. In an opinion, discussing *Shelton v. Tucker*, 364 U.S. 479, and other cases, the Washington Supreme Court declared that: "Unlike the Arkansas statute, our act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130.

The opinion of the District Court, below, considered *Sweezy v. New Hampshire, supra, Shelton v. Tucker, supra,* and *Cramp v. Florida,* 368 U.S. 278, and other cases. The District Court agreed with the Washington Court, holding:

> "Recent cases have made clear that a substantial invasion of such rights may not be justified by reliance on a state's right to inquire into the fitness and competency of teachers. But we find no such invasion of constitutional rights by the statute and oath in question here. A careful consideration of the language of the oath confirms the impression left by a cursory reading: namely, that the oath does not require any statement as to political, religious, economic or social beliefs of the person subscribing thereto, nor does it require him to refrain from membership in any kind of association whatever, *except* those associations which have an aim or purpose to overthrow, destroy or alter the constitution and government of the state or nation by revolution, force, or violence."

"Foreign Subversive Organization"

That the District Court is flatly in error and misunderstands the breadth of the 1955 disclaimer oath is clearly demonstrated by reading the statutory definition of "Foreign Subversive Organization" which in no way is qualified and limited in its application only to those associations seeking change in government *by revolution, force, or violence*. The "foreign subversive organization" section, in its permutations and combinations, confronts an affiant with 16,200 questions, each of which is required by statute, and which an affiant must disclaim or be ineligible for state employment. There is no middle ground. Not one question is limited to membership in associations willing to use force or violence or engage in revolution

as a means for social or political change (See Exhibit 14, pages 47 to 52).

One example will suffice: "Foreign subversive organization means any organization directed . . . indirectly by a foreign government . . . a purpose of which is to advocate . . . activities intended to . . . assist in . . . the alteration of the constitutional form of government of the United States or the State of Washington . . . and to establish in place thereof any form of government the direction and control of which is to be vested in . . . any foreign government, organization or individual." In application then, if the government of Australia were to advocate that we in America alter our constitution, by amendment, to vest direction and control over nuclear weapons, and other military decisions, in the United Nations, then, according to this definition, each citizen of Australia, Professor Kenneth E. Read, appellant here (P-T.O. 110-111), would be a member of a "foreign subversive organization" and ineligible for professorial employment at the University of Washington. Counsel cannot advise Professors Rhoads Murphey or Z. W. Birnbaum, and many others at the University of Washington, (see statement of the case, *supra*) that they are not members of foreign subversive organizations, as defined by this statute. The expansive breadth of this section clearly transgresses the bounds of legitimate state power and is unconstitutional under the First and Fourteenth Amendments.

"Subversive Person"

"Subversive persons" are defined by many gradations of speech and associations. But, as this Court pointed out

in *Sweezy v. New Hampshire*, 354 U.S. 234 at 246, when it had statutes before it identical in wording with those in this case: this Court's "interest is in the minimal requirements of that definition since they will outline its reach." Accordingly, a "subversive person" is "any person who . . . teaches by any means any person to . . . aid in the commission of any act intended to . . . assist in the . . . alteration of the constitutional form of government of the United States, or of the State of Washington . . . by revolution, force or violence;" Thus, a professor who teaches his students "by any means" that the American Revolution was justified under the circumstances set forth in the Declaration of Independence, and that revolution would again be justified if American government degenerated to those conditions, would, by this definition, be a "subversive person." The "subversive person" section, in its permutations and combinations, presents 34,290 separate questions to an affiant, which he must disclaim or be ineligible for continued employment. There is no middle ground (Ex. 14, pp. 53-57).

Each question reveals the potential sweep of the statutory definition of a "subversive person" and that it extends to speech and conduct which is only remotely related to actual subversion. When judging this section, this Court's comments on an identically worded statute were not followed by the District Court:

> "The possible remoteness from armed insurrection of conduct that could satisfy these criteria is obvious from the language. The statute goes well beyond those who are engaged in efforts designed to alter the form of the government by force or violence. The statute declares, in effect, that the assistant of an

assistant is caught up in the definition." (*Sweezy v. New Hampshire*, 354 U.S. 234 at 246.)

"*Subversive Organization*"

Washington's 1955 oath's final definition, that of "subversive organization," is sweepingly broad. A "subversive organization" is "any organization . . . a purpose of which is to . . . teach activities intended . . . to assist in the . . . alteration of . . . government . . . by revolution, force and violence." Again, an assistant to an assistant is caught up by this definition, and it matters not whether the group be temporary or permanent. Suppose that a group were in existence only for the purpose of advancing all views on every subject, including, as one of its many views that of abetting, advising, or teaching, by any means, activities intended to assist another group in its attempts, or in its assistance to others who desire to alter government in the prohibited manner. Knowing membership in this first group is enough to qualify one as "subversive"; it need not be active membership. It is not possible under this statute, for a group member who is opposed to one of the group's purposes, say the one prohibited by this Washington statute, to remain a member of the group and to become, or remain, a state employee, even though he dissents from that particular purpose, is not active, and believes that the group as a whole is worthwhile. This is guilt by association.

In many cases—which were rejected by the District Court—this Court has held that government has no power to prohibit or punish mere knowing membership in the Communist Party, if it is not "active." Otherwise, the

principle of guilt by association, foreign to our law, would be approved. *Scales v. U.S.*, 367 U.S. 203; *Noto v. U.S.*, 367 U.S. 290; *Yates v. U.S.*, 354 U.S. 298, and *Dennis v. U.S.*, 341 U.S. 494. It is clear that Washington has no power to incorporate the principle of guilt by association into her employment policies. It surely cannot go beyond inactive, but knowing membership in the Communist Party, if that far, and prohibit absolutely all state employment to those persons who are members of "subversive organizations." Furthermore, this Court has held that the First Amendment grants to every citizen the constitutional right to advocate violent overthrow of government so long as he does not incite others to unlawful action:

> "We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." (*Noto v. U.S.*, 367 U.S. 290 at 298).

Yet, it is exactly these, and other constitutional rights to liberty and association, that Washington insists each of its employees must give up as a condition precedent to their qualifying for employment. This Court has held these rights to be immune from the indiscriminate reach of state power.

It is no answer to argue that state employment is a "privilege" and not a "right," and then infer that the infringements here are permissible because they infringe upon no rights. This Court has set that issue at rest, holding:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." (*Wieman v. Updegraff*, 344 U.S. 183 at 192; expressly confirmed in *Torcaso v. Watkins*, 367 U.S. 488, 495-96, and in *Cramp v. Florida*, 368 U.S. 278.)

We submit that the unlimited and indiscriminate sweep of the statutes defining the 1955 disclaimer oath bring them within the ban of this Court's prior cases and that the statutes' comprehensive interferences with freedom of speech and association go far beyond what might be justified in the exercise of the state's legitimate conditions of employment for its professors and other employees.

The Unconstitutional Breadth of the 1931 Oath of Undivided Allegiance

The 1931 oath of undivided allegiance to government is likewise a broad intrusion of state power into areas forbidden the state by the First and Fourteenth Amendments. The sweep of this oath is measured by its requirement that every professor must solemnly swear that he "will by precept and example promote":

1. "respect for the flag and"

2. "the institutions of the United States of America and the State of Washington,"

3. "reverence for law and order" and

4. "undivided allegiance to the government of the United States."

This oath is an annual oath applying not only to cer-

tification and to every new teaching contract, but also to the renewal of every teaching contract in the State of Washington. Its purpose is clearly that of promoting patriotism, a purpose heretofore held insufficient by this Court as a justification for abridging freedom of speech, association, and conscience. *West Va. v. Barnette*, 319 U.S. 624. The oath seeks to achieve its goal of patriotism by requiring, among other things, that a professor give up his independence of mind and conscience and swear that he will promote by precept and example undivided allegiance to the government of the United States. Thus, this oath strikes at the very heart of free conscience, speech, and association, and seeks to impose upon all professors a thought-stifling and action-conforming nationalistic orthodoxy contrary to the clear mandate of this Court that:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *(West Va. v. Barnette*, 319 U.S. 624 at 642, and see *Engel v. Vitale*, 370 U.S. 421 at 425, where this Court denied that government had constitutional power to compose prayers and require supplication to them as part of a governmental program to further all religious beliefs.)

Yet, it is precisely these forbidden areas that the Washington legislature seeks to reach. It seeks to force professors by word (precept) and act (example) to confess their faith in an orthodox nationalism (undivided alle-

giance to the government of the United States),—all to the abridgement and detriment of the professors' constitutionally protected freedom of religion, conscience, speech and association. Of the unconstitutional invasions into these areas there can be no doubt. Also, there can be no doubt of the consequences if a professor fails to execute the 1931 oath, because the statute provides that if "any person or persons . . . fail or refuse to execute the oath . . . any contract executed or renewed, or license issued in violation hereof shall be and is hereby declared to be null and void." The statute operates summarily.

Although alleging that it would not do so, the District Court did pass upon the constitutionality of the 1931 statute, at least insofar as it involves freedom of speech, association, and conscience. The District Court held: "Insofar as the arguments heretofore considered with respect to the loyalty oath [the 1955 disclaimer oath] are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the District Court committed error and that under our constitutional system, the coercion of undivided allegiance to government is unknown. "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world have kept the hangman busy." *(Cramer v. U.S.*, 325 U.S. 1 at 21.)

The American tradition is eternally hostile toward every

form of tyranny over the mind of man. In the realm of reason and conscience *(West Va. v. Barnette, supra)* as well as in the realm of conduct *(Chambers v. Florida*, 309 U.S. 227), the forced extraction of men's beliefs or acts are incompatible with a free society. Those who equate loyalty with conformity misconceive the American tradition. Under the pressure of such legislative misconceptions, professors, in order to exercise their profession, are, in effect, compelled to hold opinions on academic, political and social matters as they have been prescribed by the Washington State legislature. To uphold this power would go too far. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." (Chafee, Z., Freedom of Speech 466 (1941)).

B. The Oaths and Possible Perjury Prosecutions

The indiscriminate breadth of these statutes takes on particular significance when one considers the possibilities of a perjury prosecution for falsely executing these oaths. At one time, perhaps, the threat of prosecutions may have been rare. But, today, our society has witnessed a rising movement in the name of anti-communism. Professional anti-communism is dangerously close to becoming as doctrinaire as communism itself—and may, indeed in some areas it does, embrace the root evil of totalitarianism—intolerance. (See, Bell, D., (ed), The Radical Right (1963); Sherwin, The Extremists (1963); Ellsworth, R.

and Harris, S., The American Right Wing (1962); Suall, I., The American Ultras (1962); First National Directory of Rightist Groups (1962); Gould, G., Inside the Birch Society (1961)). The presence of these groups in our society means that there are now jurymen who might quite likely convict for perjury on the basis of the Washington statutes set forth above.

If a professor were prosecuted for perjury, before such jurymen, much of the evidence would, most likely, come from students who sat in his classes. Given the now realistic threat of prosecution for perjury; today's anti-communist attitudes, and the possibility of student testimony against him, what professor can execute the oaths in question here and then courageously proceed openly and fairly to discuss the controversial social issues present in today's society? Could Professor Rader continue to discuss Marxism or Communism or Democracy? It matters little whether the perjury prosecution is successful. The threat of such a prosecution would cast a pall of orthodoxy over the classroom. It is an old and ugly subtlety to strike freedom of the mind in the name of patriotism with the fist of loyalty. Given the threat of prosecution, Professors will fear a continuing surveillance of their teachings and activities, to sift their loyal words from the disloyal. Discussion will end where it should begin; orthodoxy will prevail. There can be no academic freedom in such a situation. "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect." *Adler v. Bd. of Ed.*, 342 U.S. 485 at 510 (dissenting opinion).

That these are not idle fears is clearly revealed by the course of recent events. Three students at the University of Indiana, members of a student group known as the Young Socialist Alliance, were recently indicted by an Indiana grand jury for having violated that state's anti-communist statute which is worded with extremely similar terms to those in question here. The indictments are reported to charge that the three students assembled "for the purpose of advocating or teaching the doctrine that Government . . . should be overthrown by force, violence or unlawful means . . ." *The New York Times*, Western Edition, for Friday, May 3, 1963 at page 9 reports as follows:

> "'The important thing in this case,' Mr. Hoadley [Monroe County, Indiana, prosecuting attorney] said, 'is to get this organization off the campus. The University is a department of State Government'."

The State of Washington, too, has a strong component of anti-communists within its boundaries (see, Gottfried, A. and Davidson, S. The New Right in Action, *The Nation*, July 29, 1961, reprinted in Hearings, Subcommittee of the Senate Judiciary Committee to Investigate Attacks on the Internal Security Act, August, 1961). Thus, it is not idle when appellants state, in the record of this case, that they fear that if they executed either Oath Forms A or B that they may subject themselves to harassment and the threat of prosecution for perjury." (P-T.O. 99.)

This Court appears to have looked ahead to this day when it said that it "would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they

violently oppose." And, realistically, "experience teaches that prosecutors too are human." *Cramp v. Florida*, 368 U.S. 278 at 286-7. The record in this case amply supports the fears of appellants:

> "What I fear if I sign the oath is that I would have to compromise my conscience and my professional obligation to search for truth and that some member of the class will report my statements about the past improper actions of the United States and that I will be charged with perjury on the grounds that I am a 'subversive person' or that I am violating the oath [of undivided allegiance]. Various super-patriotic societies, like the John Birch Society, collect from students statements made by professors in their classes. I do not believe that I can execute Oath Form A and continue to discuss these matters as I have in the past." (Statement of Professor W. Stull Holt, P-T.O. 106.)

Professor Rhoads Murphey (P-T.O. 113) has stated: "If I signed the oath, I would not feel that I could discuss them [certain controversial issues], or encourage students to discuss them, and hence would not feel that I could in honesty teach." And at P-T.O. 112, "Whether I remain at the University of Washington will depend upon the outcome of this suit." The record is replete with such realistic statements, (see, P-T.O. 107-109, Professor Valentine; pp. 115-119; Professor Rader; pp. 120-121, Professor Dietrichson). These statements have not been impeached and they are in the record. There is nothing in the record to contradict them or to weaken them. They are true.

Nevertheless, the District Court casually dismissed all argument on this point:

> *"It has not been shown that upon subscribing to*

the 'disclaimer' oath plaintiffs will thereby experience any stifling of their freedom of inquiry, criticism and dissent, nor that their academic freedom will be impaired. Without questioning the sincerity of plaintiffs' fears that public hysteria or the temper of the times might conceivably at some future time bring about such a result *we are unable in this declaratory judgment action to find any substantiation for such fears, on the face of the statute, or in the facts of record or within judicial knowledge.* It is our conclusion that Chapter 377, Laws of Washington, 1955, does not constitute a prior restraint on First Amendment freedoms; nor are we constrained to find its language to be vague and uncertain." (Emphasis supplied.)

We submit that the lower court committed error when it made the wrong substantive decision on this point when it assumed the existence of facts not found in the record of this case, and when, in deciding the issue, it ignored facts inescapably found in the record.

C. The Court Below Upheld Infringements on Free Expression and Conscience Without Any Showing of Nexus or a Subordinating State Interest Which Is Compelling.

There are other reasons why the First and Fourteenth Amendments prevent the State of Washington from extracting these two oaths from appellants, and others, as conditions of their continued employment. As has been shown above, the two oaths seriously infringe upon freedom of thought, conscience, speech, and association. They can be justified, if at all, only if (1) the State of Washington clearly has a subordinating interest which is compelling and only if (2) there exists some nexus between appellants, and others, and the subordinating state interest. Otherwise, the mandate of the First Amendment must

prevail. These two elements will be discussed in reverse order to their presentation above.

There Is No Nexus Shown by This Record

This Court recently has clarified the concept of Nexus, saying that "regardless of the label applied, be it 'nexus,' 'foundation,' or whatever, . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition *that the state convincingly show a substantial relation* between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida*, 372 U.S. 539 at 546 (emphasis supplied). This nexus must be shown in order to justify the oaths. *Am. Comm. Assn. v. Douds*, 339 U.S. 382.

To decide the nexus question the District Court must look to the facts in this record to ascertain whether the required nexus has been supplied by the state, defendant-appellees here. Although counsel for appellants urged this course upon the District Court, it held that:

> "*It must be presumed* that legislative findings sufficient to justify the enactment of the 1951 statute were made, and that the 1955 amendment was supported by the same findings. We are therefore unable to accept plaintiffs' argument that there has been no showing of a public danger sufficient to justify the enactment of restrictive legislation." (Emphasis supplied.)

Thus, the District Court sustained the constitutionality of the Washington legislation by way of "presumption." In doing so it not only ignored the mandate of this Court on the Nexus point, but also, the District Court assumed

two deviations from the actual facts of this particular case; first it assumed a state of facts which the record does not support, and secondly, it refused to consider facts which are clearly in the record in this case. For example, the District Court refused to consider a carefully worked out agreed fact that appellants do not knowingly use their employment at the University of Washington, through teaching, or in any other way, in attempts to bring about violent or forceful overthrow of government (P-T.O. 88). Neither the Attorney General for the State of Washington, nor the Board of Regents of the University, or its President, possess any information indicating that any appellant, or others similarly situated, is a member of the Communist Party, or is a "subversive person," or that any appellant, or others similarly situated, has influenced anyone else to become a "subversive person" or a member of a "subversive organization." (P-T.O. 97, 98.) In other words, the District Court refused to consider facts which positively show that there is no nexus between appellants, and others, at the University of Washington, and subversive activities in the State of Washington.

In addition, the District Court refused to consider other relevant facts. The Washington Committee on Un-American Activities made its report, significant portions of which have been conclusively shown to be false (P-T.O. 115-118), at the beginning of the 31st Washington Legislature in January 1949. Meeting in full session immediately thereafter that legislature enacted no legislation on the basis of its committee report.

At the time when that legislative session was beginning, the University of Washington was concluding its separate and immediate action to rid itself of employees, faculty and otherwise, who might have been subversive, as reported by the legislative committee. See, Countryman, *Un-American Activities in the State of Washington,* Ch. VI, "Investigation by the University," pp. 186-285 (1951). As reported by the University President, Raymond B. Allen:

> "On January 22, 1949, the Board of Regents of the University of Washington took final action in six tenure cases which for more than six months had been before various faculty and administrative officers and agencies. The action of the Regents consisted of the dismissal, as of February 1, of three professors and the retention of three others on two-year probation subject to the requirement that they sign and file with the President of the University affidavits that they are not now members of the Communist Party." *(Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington 11 (1949).)*

During the hearings of the legislative committee, only ten members of the University of Washington faculty of 700 full-time members, were named, but not proved, as being, or having been, members of the Communist Party. Thus, the record is clear that whatever doubtful nexus the frequently false Report of the Joint Legislative Fact-Finding Committee (Washington Un-American Activities Committee) may have provided between the faculty of the University of Washington and subversive activities, that nexus was eliminated by the independent investigations, conducted by the Board of Regents, which termi-

nated in probations or dismissals of six faculty members. It is extremely doubtful whether, on this record, the 31st session of the Washington legislature of 1949 could demonstrate and "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." However, as the District Court failed to note, the 1949 session of the legislature enacted no "anti-subversive" legislation.

It was not until 1951, and the thirty-second regular session of the Washington Legislature, that such legislation was enacted. When the 1951 Legislature convened, Governor Langlie reminded it of the disclosures of the Washington Committee on Un-American Activities. In his message he made references to the Committee's Report, but he made no references to the University of Washington. He advised that "in light of the grave emergency which we now face, additional action must be taken immediately . . ." (Message of Arthur B. Langlie, Governor of Washington, to the Thirty-Second Legislature, January 10, 1951.) The 1951 legislative session enacted the comprehensive Washington Subversive Activities Act.

But, it was in 1955, six years after the Committee Report, that the 34th Washington Legislature, without holding any hearings, enacted the 1955 oath requirement challenged in this case. Thus, by no stretch of the imagination, can the needed nexus between the 1955 Act and "subversive activities" at the University of Washington be satisfied by the investigations of the Washington Committee on Un-American Activities during 1948, reporting in 1949.

We submit that the District Court not only failed to follow the mandate of this Court and thereby committed error when it made the wrong substantive decision on the nexus question, but also that it committed error in not examining the past history; that its decision on the nexus point assumed the existence of facts not found in this record and that its decision on this point ignored facts found in this record. In short, the District Court decided the nexus question presented by this case, without confronting, or exploring, the issues involved in it, although they had been fully briefed and argued.

There Is No Showing of an Interest of the State Which Is Overriding and Compelling

Even if there were no problems of nexus presented by this case, a constitutional problem would remain. Where state statutes seriously infringe upon freedom of expression, as in this case, then that infringement can be justified, if at all, only when the state clearly shows a substantial interest which must be overriding and compelling. If such interest is insubstantial, or non-existent, or not compelling, then, it clearly cannot outweigh or prevail against the protection afforded by the First and Fourteenth Amendments. *American Communications Association v. Douds*, 339 U.S. 382; *Sweezy v. New Hampshire*, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539.

In this case, the 1931 oath statute is designed to promote undivided allegiance to government, and it requires that every university faculty member exhibit such fidelity "by precept and example." The 1955 oath statute likewise seeks to promote loyalty and was characterized as a

"loyalty oath" statute by the District Court. The objective of both oaths is to encourage loyalty to state and national institutions, and to provide an incentive for the defense of our country. In short, it is the purpose of the oaths to protect the state against "subversive" infiltration:

> "A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching." *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 482.

But, the state here seeks to achieve its purpose by requiring professors to achieve a certain attitude and a certain prescribed state of mind. The oaths operate to discourage or suppress the utterance of certain prohibited doctrines and certain associations, not because the doctrines are dangerous, but because they have been outlawed by the Washington Legislature. Thus, this case raises a constitutional issue expressly left unresolved by this court in *American Communications v. Douds*, 339 U.S. 382 at 396, where this Court said:

> "Government's interest here is not in presenting the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced . . . . Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs."

It is too clear for argument that the two Washington statutes are not designed simply to identify persons, but rather, they have been designed to outlaw certain doc-

trines and to rid state employment of those, otherwise fully qualified, people who refuse to execute the oaths. The statutes in question here do not allow, for example, a state employee the opportunity to say that he is "a subversive person," and thereby be identified. They require that, if anyone is to qualify for state employment, only one answer can be given: that he is not a "subversive person," or a member of a "subversive organization," and, in the case of a professor, that he will promote "undivided allegiance to government" by "precept" and "example." Thus, only members of this statutorily defined class are eligible to serve as professors at the University of Washington. Everyone else is automatically excluded from any possibility of state employment, an exclusion based on criteria, constitutionally forbidden to the state, of belief, speech and association.

Thus framed, the constitutional issue narrows itself to whether the State of Washington can properly prohibit, as a condition of continued employment, freedom of speech, expression and association of professors, and other employees, at the University of Washington in the interest of the state in promoting what the legislature believes to be right thinking and correct attitudes on the part of its state employees, including professors. It should be clear that at least this much is necessarily involved in this case. If a state actually has this power, it becomes a monitor of thought, as it determines for its employees what is and what is not right thinking, and, in this case, the State Legislature becomes the monitor of thought and right thinking for every faculty member

at a great educational institution, the University of Washington.

When it balanced the interests in this case—the interests that a professor has in academic freedom and freedom of speech, association and expression against the interests that the state has in protecting itself from its employees uttering the prohibited doctrines and engaging in the prohibited associations—the District Court ignored the balancing done by this Court in its most relevant case. *Sweezy v. New Hampshire*, 354 U.S. 234, presented this Court with statutes of New Hampshire worded identically with those defining the 1955 oath in question here; and pitting (1) the interests of a guest faculty member of the University of New Hampshire in academic freedom versus (2) the interests of a state in protecting itself from subversion. The plurality opinion of four justices, not followed by the District Court, declared:

> "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." Id. at 251.

The concurring opinion of two justices—also not followed by the District Court—held:

> "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority . . . To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy as protected by the Fourteenth Amendment, and the right of the State to self-protection." Id. at 266-267.

Thus, the joint decision of six justices in *Sweezy* bal-

anced the interests presented in this case in favor of a professor's constitutional rights to intellectual academic freedom. Although counsel urged this view, the District Court refused to follow the *Sweezy* case.

The lower court also refused to follow this Court's pronouncement in *Barenblatt v. U.S.*, 360 U.S. 109 at 112, that academic freedom is an area of special concern:

> "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."

We submit the District Court committed error when, without any facts in record in this case to demonstrate the state's need to infringe upon liberty at the University of Washington, it held that the interests of the State of Washington in self-preservation justified imposing these thought- and action-conforming oaths upon appellant-professors, and other employees. Clearly, truth rings loudly in the words of J. B. Bury, particularly when his words are applied to the professorial appellants in this case:

> "A long time was needed to arrive at the conclusion that the coercion of opinion is a mistake, and only part of the world is yet convinced. That conclusion, so far as I can judge, is the most important ever reached by men." (J. B. Bury, A History of Freedom of Thought (1913).

But it is essential to recognize—as the District Court did not—the full extent of recent infringements upon constitutional liberty and their implications for academic and political freedom at universities in the United States today.

D. Recent Abridgments of Academic Freedom

It appears that pressures on our schools and upon our universities and colleges to become vehicles of orthodoxy have been increasing (See, e.g., 1962 enactments of Fla. Stat. §230.23, and LSA-R.S. §§2851, 2852) producing a spate of new attacks on professors and academic freedom. (See, e.g., The Lines of Attack on Academic Freedom, Part III, in MacIver, Academic Freedom In Our Time, 123-205 (1955); ACLU, Greater Philadelphia Branch, Academic Freedom: Some Recent Philadelphia Episodes (1954), and note, 42 Am. Ass'n U. Prof. Bull. 75 (1956)).

From 1945 to 1950, the American Association of University Professors had before it for consideration some 227 cases which involved academic freedom, not counting the many "situations" which are not classified as cases. Report of Committee T, 37 Am. Ass'n of Univ. Prof. Bull. 79 (1951). Later, during the decade of the fifties, legislative investigating committees heavily taxed academic freedom. Nineteen cases have been reported, and they usually involved a faculty member who refused to answer a question, thereby stimulating an institution to undertake actions that ultimately led to dismissal. (See the chart of these cases which appears at page 16 of the Brief of the Amicus Curiae (AAUP) in *Barenblatt v. U. S.*, 360 U.S. 109 (1959)). In some of the above cases, the faculty members as well as the university administration were at fault; nevertheless, this fact does not decrease the impact of the investigations and dismissals on the "spirit of freedom" so essential for fruitful academic labor.

In addition, there were fourteen dismissals from New York City Municipal Colleges (See, 42 Am. Ass'n Univ. Prof. Bull. 71 (1956)) under a state statute which this Court later found to be unconstitutional. *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551. Furthermore, R. E. Combs, counsel to the California Senate Committee on Un-American Activities, has testified that a number of college and university presidents in California have arranged for a "clearance" from the state committee of all new faculty appointees, and, privately, to receive "derogatory information" regarding their present staffs. Hearings, Subversive Influence in the Educational Process, 83 Cong., 1st Sess. pp. 605-622 (1953). Finally, it has been estimated that approximately 500 teachers (school and university) have been dismissed between 1948 and 1958, mostly for refusals to answer questions or to execute loyalty oaths as conditions of employment. See Appendix A in Brown, Loyalty and Security: Employment Tests in the United States, 498 (1958).

One point is entirely clear: fruitful intellectual labor requires, as its necessary condition, that all faculty members be possessed of a "sense of freedom." "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234 at 250. But, in the years which have followed World War II, when intellectual liberty has been so much under attack, one study finds that faculty members are no longer strongly possessed of a "sense of freedom." Lazarsfeld and Thielens, The

Academic Mind (1958). This study showed that: (a) 46% of all the teachers who were studied felt "apprehensive" about their freedom to teach and speak freely (pp. 84-85) but, a significantly higher percentage, 54%, of those teachers who were studied but without tenure felt "apprehensive" about their freedom (p. 240); (b) this "apprehension" put a "noticeable damper on the activities and opinions" of these teachers (p. 192); (c) some professors toned down their writings and did not express their full convictions and thought in their writings and avoided assigning "controversial" reference works for discussion (p. 197); (d) some teachers avoided controversial subjects in the classroom (p. 197); and (e) some teachers found that their relationships with their students were substantially impaired (p. 204 ff).

The heavy hand of attack on academic freedom has not been foreign to the University of Washington. Although some of the following facts have been discussed under the question of nexus, they bear repetition in this section on academic freedom. In 1947, the legislature of the State of Washington created a committee to investigate "un-American activities" in the state. That committee functioned for two years, holding two public hearings, and made its report to the legislature in 1949, two years before the enactment of the Washington Subversive Act of 1951, and six years before the 1955 amendment to that Act, the constitutionality of which is challenged in this case. The second public hearing was held on the University of Washington campus starting on July 19, 1948. During the hearings, the Washington Legislative Committee

investigated at least forty faculty members, including Professor Melvin Rader, appellant here. The committee unanimously, but absolutely falsely, reported to the legislature that Professor Rader did not tell the truth when he testified before the committee and falsely reported that he had been closely associated with twelve organizations officially cited as communist fronts and subversive (P-T.O. 117). A book reporting the activity of this committee, including its hearing on the University of Washington campus, has been published: Countryman, Un-American Activities in the State of Washington, 72-332 (1951).

As a result of the committee hearings, charges were filed, before the tenure committee of the University of Washington, against six members of the University of Washington faculty, charging, in effect, that certain faculty members, at that time (1949), either were, or had been, members of the Communist Party, and that they refused to admit it. In an open letter published in early October, 1949, University President Raymond B. Allen said that:

> ". . . the real question before the University of Washington is whether members of the Communist Party are qualified to serve on this University faculty, and, more specifically, whether they should be disqualified on the grounds stipulated in the Code." (Quoted from Countryman, Un-American Activities in Washington, 190-191 (1951).)

The net result of the tenure hearings was that three members of the faculty were discharged by the Board of Regents, and certain other members of the faculty, who

had been so charged, were required, as a condition of continued employment, to sign affidavits that they were not then members of the communist party and, in addition, they were put on probation for two years. The tenure committee hearings, the actions by the Board of Regents, and other university investigations of the faculty were concluded in 1949, two years before the enactment of the Washington Subversive Activities Act and six years before the 1955 amendment to that Act which is challenged in this case. See, Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington (1949). There can be no doubt that there were significant and substantial invasions of rights to academic freedom at the University of Washington.

> "These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread." *(Sweezy v. New Hampshire*, 354 U.S. 234 at 250.)

> "When weighed against the great harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Sweezy v. New Hampshire*, 354 U.S. 234 at 261.) (Concurring opinion.)

E. The District Court Upheld Indiscriminate Infringements Upon Free Expression and Conscience When the Legitimate State Interest Can Be More Narrowly Achieved By Less Drastic Means; Thus, the Lower Court Upheld an Unconstitutional Previous Restraint.

In a recent case, *Shelton v. Tucker*, 364 U.S. 479 (1960),

this Court had occasion to apply the doctrine of prior restraint, holding unconstitutional an Arkansas statute which invaded academic freedom and freedom of assembly and association. An Arkansas statute sought its justification, in the "right of a state to investigate the competence and fitness of those whom it hires to teach in its schools . . ." *id.* at 485. This interest was held too insubstantial to justify the broad invasion of First Amendment rights.

That case, like the one at bar, was tried before a three-judge federal court wherein plaintiffs in *Shelton v. Tucker*, as did appellants here, asked that the District Court declare their rights under the Declaratory Judgments Act and that the District Court issue a permanent injunction perpetually enjoining the Arkansas statute. This Court granted this relief, holding that the Arkansas statute was a prior restraint on the freedom of intellectual liberty, speech and association. The Arkansas statute cast its net too broadly and indiscriminately:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, at 488.

In *Speiser v. Randall*, 357 U.S. 513, this Court, citing cases in which the doctrine of prior restraint had been applied (*id.* at 520 and 521), held unconstitutional a California statute which allowed a *privilege* of an additional property-tax exemption to World War II veterans, on the condition that they would take this oath:

"I do not advocate the overthrow of the Govern-

> ment of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." *id.* at 515.

This oath in no way makes such sweeping infringements on freedom of expression as do the two Washington oaths at bar; they catch up an assistant to an assistant, or prescribe undivided allegiance.

In *Speiser*, the state offered the privilege of an additional tax exemption on the condition that the applicant execute the oath; whereas, in the case at bar, the State of Washington offers state employment, on the condition that the applicant execute oath forms A or B. It cannot be gainsaid that, in both cases, and in *Shelton v. Tucker*, *supra*, the oaths in question deal with intricate and complex webbing of the freedoms which make up the First Amendment: free speech, assembly and association. In such instances, then, the constitution requires that "the *operation* and *effect* of the *method* by which speech is sought to be *restrained* must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *id.* at 520, citing prior restraint cases. The question is whether a fair method had been established. When deciding this issue

> "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488.

As demonstrated by the record in this case, there are at least two alternative, and individually selective, procedures for identifying "subversives" and eliminating them

from state employment at the University of Washington. These procedures are less drastic than the oaths. These two procedures are currently in force and have the same purpose as do the oath requirements, questioned in this case.

The first technique has been set forth by the Washington legislature when it enacted Washington's Subversive Activities Act, Section 12, Chapter 254, Laws of Washington, 1951, providing:

> "Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury."

This statutory provision, in force today, allows the University of Washington to use a selective approach to the problem of "subversive employees" and does not have within it the vice of a wholesale infringement on First Amendment rights implicit in the use of the two oaths. This section, considered alone, functions as a means of identification and not as a necessary technique of exclusion, and, in this way, too, it is less drastic.

The second more selective and, hence, less drastic, alternative to the problem of subversives is found in the Ad-

ministrative Code of the University of Washington. It dates prior to the 1951 legislative enactment cited above. The Faculty Appointment Policy clearly establishes the fact that "subversive" persons are ineligible for appointments. Volume II of the Faculty Handbook, Chapter I, pages 19 and 20, set forth the Basic Considerations Involved in Appointments of Faculty at the University of Washington (Ex. 4):

> "The University should avoid harboring within its faculty any who are dedicated to the destruction of our liberties and our free institutions, upon which universities depend for their effective functioning. (*id.* at 19.)
>
> "The Subversive Activities Act of 1951 . . . imposes a restriction upon the power of the regents to appoint or retain as a member of the university staff any 'subversive person' . . . But, even prior to the legislative enactment of 1951, the regents, exercising the discretion vested in them by statute, had taken the position that active members of the communist party are disqualified to serve upon the University Faculty. This policy in effect anticipated the requirements of the state Subversive Activities Act." (*id.* at 20).

University President Charles E. Odegaard has stated that the existing recruitment procedures are adequate to protect the public interest (P-T.O. 93). They have been improved from time to time and, during the time these oaths were not administered, because of the injunction in the prior litigation, lasting from 1955 to 1962, no "subversives" have become state employees at the University of Washington (P-T.O. 98-99). In addition, many appellants, and others similarly situated, have security clearances for top level governmental research (P-T.O. 99).

Thus, it is clear that the record in this case presents two less drastic alternatives involving more selective procedures than do the oaths. Neither alternative makes the same broadside attack on First Amendment liberties. Each has provided for security measures in a fashion such that a good faith exercise of conscience or other First Amendment rights affords a hearing which may except an individual from their application, this issue would be determined by state agencies in the same manner as other factual issues. But, the 1931 and 1955 statutes fail to make specific provision for the exceptional, the explainable, or for the man of principle.

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures is not a hardened communist, but a loyal citizen with conscientious scruples. The 1931 and 1955 statutes assure this result. This problem is easily rectified if the legislature were required to dispense with the shorthand of a summary oath form, and provide more extensive and fair screening procedures (which in fact already exist and are used at the University of Washington).

This Court has held that the state must achieve its legitimate purpose by the method having the least impact on First Amendment rights. The Washington statutes questioned in this case do not meet this constitutional test. Consequently, they are unconstitutional previous restraints on freedom of expression.

This conclusion is patently clear, and it was urged to the District Court. Although plaintiff-appellants' trial brief

contained some 22 pages devoted to a discussion of the prior restraint point, and although the point was orally argued, the District Court dismissed this argument with the following inadequate paragraph:

> "As to alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination[28] or lack of frankness and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point."

We submit that the District Court not only committed error on this point in that it reached the wrong substantive decision on the prior restraint question, but also, that it committed further error when it ignored the facts found in the record and decided this question without confronting, or exploring, the issues involved in the question, although they had been fully briefed and argued.

II.

The District Court Upheld the 1931 and 1955 Enactments Although Said Enactments Infringe Upon Freedom of Expression Without Affording a Hearing, and Although They Shift the Burden of Proof; Each of Which Is In Violation of Due Process of Law.

A. The Lack of a Hearing

The District Court's opinion clearly indicated that this question is substantial: "As in the prior litigation arising out of this statute, the question whether or not an employee who refuses to subscribe to the loyalty oath will be afforded a hearing prior to discharge presents a substantial issue of due process."

But, instead of deciding this question, the lower court assumed it away by assuming the existence of facts not found in the record and without exploring the issues this question presented, and without considering, indeed ignoring, the expressly stated policy of the Washington legislature, the Board of Regents and the Washington State Supreme Court on this point. The District Court held: "The fact that refusal on any ground is declared to be 'cause' for immediate termination of employment does not close the door to hearing and inquiry; nor does it preclude the exercise of administrative discretion if it should appear that the refusal to sign the oath is in no way related to a willful refusal to make disclosure as to whether or not the employee is a member of a subversive organization. . . . As was pointed out earlier in this opinion, in this declaratory judgment proceeding the dismissal policies and hearing procedures which would actually be put into effect by the University administration under the statute and/or

under its own rules and regulations are a matter for speculation. On the showing here made this court will not presume that the defendant state officials will act arbitrarily or in disregard of constitutional rights of public employees, but this court must assume that the statute will be administered and applied in a constitutional manner."[49]

We submit that state policy on this point is not a matter for speculation.

It has been established in the above discussion of question one that the oaths in this case severely infringe upon freedom of conscience, religion and expression. Facts occurring subsequent to the date this Court declined jurisdiction in *Nostrand v. Little*, 368 U.S. 436, close the door to effective hearing and inquiry. They show that the infringement upon freedom of expression is without a meaningful hearing afforded to any employee at which he could explain or defend his refusal to execute the oaths. This is the state policy declared by the Washington legislature, and followed by the Board of Regents and the Washington Supreme Court, and which was ignored by the lower court. It will be demonstrated as follows:

On or about May 25, 1963, as shown by a memorandum from President Odegaard (P-T.O. 87), which, in part, demanded that appellants execute the oaths in question in this case, and which they have refused to sign, the Board of Regents of the University of Washington adopted the following statement relative to those faculty members having tenure who should not sign the proffered oath:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice

of termination of employment, and appeal to the tenure committee, it *should be indicated that the grounds for termination are failure to comply with a provision of Washington State law which is binding upon the Board of Regents.*

"Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:

" 'The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.

" 'They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents, as defined in the laws of the State of Washington.'

"In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow customs on tenure described in Chapter 25 of the Faculty Code. The Board, *however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington, and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath.*" (Emphasis supplied.)

This statement by the Board of Regents means that it has adopted a new ground for dismissal of tenured faculty: failure to execute the oaths here in question. In meeting the responsibilities and obligations imposed upon the Board by the Laws of the State of Washington (including Chapter 103, Laws of Washington, 1931, and Chapter 377,

Laws of Washington, 1955), it cannot waive the requirements of the acts in regard to the execution of the oaths; and thus the customs affecting professors with tenure, as described in Chapter 25 of the Faculty Code, cannot and will not be followed. In short, any tenure hearing would be a sham because no explanation or justification for refusal to sign the oaths could be accepted. Yet, these very rules and regulations, before amendment by the Board of Regents, were relied upon by the Supreme Court of the State of Washington (and as set forth in the appendix to the decision of *Nostrand v. Little*, 58 Wn.(2d) 111 at 135-137) as affording a hearing to Professors Nostrand and Savelle, holders of tenure. At page 131 the Washington court held:

> "We are of the opinion that the provision in the subversive activities act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract is deprived of the right to a hearing as provided in the rules and regulations of the University. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the University's rules and regulations, set forth in the appendix to this opinion."

The ruling by the Board of Regents accords fully with the intent of the Washington legislature as it is revealed by the structure of the oath statute itself. Section 1 of Chaper 377, Laws of the State of Washington, 1955 (RCW 9.81.070, the statute under scrutiny), provides that

refusal to execute the anti-subversive oath "*on any grounds* shall be cause for *immediate termination* of such employee's employment" (emphasis supplied). RCW 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. These two sections can have only one meaning—ignored by the District Court—that no matter what reason an employee has for belonging to a "subversive organization," nor what is the nature of his association therewith, or the purpose thereof, nor why he is unable or unwilling to execute the oath, nevertheless, he is subject to immediate and automatic discharge without any realistic opportunity to be heard or to explain his refusal to execute the oath. There are no exculpatory grounds.

If there were no possible explanation or defense for a refusal to execute the oath, or for affiliation with a subversive organization, then it might be said that hearing and notice would be unnecessary because such refusal or affiliation would be an inevitable concomitant of unfitness or disloyalty. It takes little imagination, however, to picture a number of situations which would cause an employee at the University to refuse to sign this oath and which situations would in no way reflect on the employee's loyalty or fitness for the job. The employee might be associated with a subversive organization for counter-espionage purposes in connection with either governmental or patriotic organizations. He might belong for the purpose of sociological study of "fringe organizations" or to satisfy his personal intellectual curiosity as to the functioning of such organizations, or he might belong solely

to get the benefits from the wholly lawful aims of the organization or to assist in such lawful aims, while eschewing its disloyal aims. (Cf. *Scales v. U.S.*, 367 U.S. 203; *Bridges v. Nixon*, 326 U.S. 135.)

In none of these situations should his membership reflect in the slightest degree on his loyalty or on his fitness for employment. Thus, even knowing membership in a subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. And yet his membership, under the statutes at bar, would either (1) be the basis for his refusal to take the oath and thus incur immediate dismissal from State employment under Section 1 of the 1955 Act, or (2) would require a false statement under oath that he is not a member of the subversive organization which in turn would disqualify him for public employment pursuant to RCW 9.91.060, and qualify him as a target for a perjury action. There is no middle ground.

Moreover, by now it has been clearly demonstrated that such a "disclaimer oath" is exceedingly offensive to a large and respectable segment of our citizenry. A number of universities have refused substantial student scholarship grants under the National Defense Education Act of 1958 solely because this Act requires a student-applicant to execute an oath very similar to the oath prescribed by the Washington State Statute. (See, P-T.O. 96). Both individually and through such representative organizations as the Association of American Colleges, the Association of American Universities, the American Association of Land Grant Colleges and State Universities, the National Asso-

ciation of State Universities, the American Association of University Professors, and the Association for Higher Education of the National Education Association, the colleges and universities of the United States have vehemently protested this affidavit requirement in the National Defense Education Act and have urged its repeal. (See Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959.) And, finally, Congress has repealed it. If the taking of an oath, such as the ones under scrutiny, is so deeply offensive to such an important segment of our society, it is reasonable to assume that the Washington disclaimer oath will be refused by at least some loyal and worthy citizens, such as appellants in this case, simply because of its offensive and insulting nature. And yet, such a refusal "on any grounds" shall be cause for "immediate termination" of employment. No meaningful opportunity is afforded a State employee, appellants here, to explain or defend his failure to execute the oath or his affiliation with a "subversive organization."

The Washington Supreme Court has expressly declared state policy which stimulated the ruling by the Board of Regents on May 25, 1962, discussed above. That court has determined that if a tenured professor should request a hearing and refuse to execute the oaths, then he should be dismissed solely for that reason. Thus, the hearing afforded tenured professors is a sham. The Washington Court, twice, has declared state policy on this point. In *Nostrand v. Little, supra,* at page 131 the Washington Court said: "If he does not wish to sign the oath, he may

seek private employment." This statement is simply an affirmation of the position of the Washington Court in its earlier case involving these statutes:

> "Respondents [Professors] are not compelled by section 12 [the section requiring the 1955 oath] to do anything. But if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, and *their refusal to do so renders them ineligible for further employment*" (emphasis supplied). *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477, also see p. 483.)

The Washington Supreme Court has indicated that non-tenured professors are not entitled to a hearing. It has been very careful to limit the areas in which hearings would be granted, limiting these areas to persons holding tenure or civil service rights. At page 123 in *Nostrand v. Little, supra*, it stated:

> "This court has very recently held in *Yantsin v. Aberdeen*, 54 Wn.(2d) 787, 345 P.(2d) 178 (1959), that, in the absence of civil service or other tenure rights, public employees may be discharged by their employers without any reason being assigned therefor. . . . Since the power to discharge is absolute except for such tenure rights, the discharged public employee is not entitled to a hearing regarding the reason for his discharge."

There can be no question argued regarding the Civil Service Act. This act is RCW 41.06. That statute is clear in that the non-tenured appellants in this case are not entitled to a hearing under the State Civil Service Law. Non-tenured employees would include both non-tenured faculty and certain other employees of the University

having no teaching responsibilities. Section 7 of that Act clearly provides:

> "The provisions of this act do not apply to . . . (3) Academic personnel of the institutions of higher learning and other such positions as are exempted under section 5 of this act; . . ."

The other exemptions in Section 5 include students, part-time or other temporary employees, and "part-time professional consultants." Thus, clearly all non-tenured appellants in this action are not afforded a hearing by the Civil Service Act.

In addition, the Washington court also decided other questions relating to state law and which had been argued in *Nostrand v. Little, supra,* by the Attorney General to govern the professors' right to a hearing. This holding is extremely significant for the appellants in this case who are non-tenured and thus, receive no hearing under the tenure code. The Washington Supreme Court stated that the Administrative Procedures Act has no application to the University of Washington regarding the execution of the oaths in this case:

> "The regents have urged, in their reply brief, that the professors are entitled to a hearing under the model state administrative code (Laws of 1959, chapter 234, RCW 34.04.010 et seq.), citing *Wong Yang Sung v. McGrath,* 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445. However, we are of the opinion that this 1959 statute was not intended to supersede established procedure adopted by the regents pursuant to RCW 28.77.120 and 28.77.130. There is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years."

This Court, in many circumstances, has had to look behind an administrative hearing or trial to see whether it has been a hearing in fact. If this Court finds that only a sham hearing took place, where a real hearing is required, then, it has struck down the results of the sham hearing as a violation of due process of law. See, *Moore v. Dempsey*, 261 U.S. 86, (mob-dominated trial); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, (no real trial of issues in a civil suit); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, (immigration hearing board failed to exercise its statutory discretion due to acts of Attorney General); *Tumey v. Ohio*, 273 U.S. 510, (Pecuniary interest of Judge in result of trial); *Powell v. Alabama*, 287 U.S. 45, (court-appointed counsel found not to have been adequately representing defendant); *Thompson v. Louisville*, 362 U.S. 199, (lack of evidence made conviction a denial of due process).

In this case, the alleged hearing, based solely on the issue of whether or not the professors have signed the oath, has a predestined outcome since their failure to sign the oath will itself be the occasion for its being, and the irrebuttable evidence sufficient for dismissal. The "hearing" is consequently a meaningless act and will not serve to protect the tenured professors' rights. This sham hearing in the case of tenured professors, and the even more summary dismissal of the non-tenured professors, constitutes arbitrary action of the state under the doctrine of *Slochower*.

In *Slochower v. Board of Education of New York*, 350 U.S. 551, this Court pointed out that, even though "a per-

son does not have a constitutional right to government employment," his dismissal "must comply with reasonable, lawful, and non-discriminatory terms". (p. 555). In the majority opinion in that case, Mr. Justice Clark stated:

> ". . . *Adler v. Board of Education*, 342 U.S. 485, 96 L.ed. 517, 72 S. Ct. 380, 27 ALR (2d) 472, upheld the New York Feinberg Law which authorized public school authorities to dismiss employees who, *after notice and hearing*, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise, *Garner v. Board of Public Works*, 341 U.S. 716, 720, 95 L.ed. 1317, 1322, 71 S. Ct. 909, upheld the right of the City to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for public service,' including their membership, past and present, in the Communist Party or the communist political association . . ." (Emphasis supplied.)

In both *Adler* and the *Garner* cases, the employee was afforded an opportunity for a hearing at which he could explain his position and defend himself from any implications of disloyalty or unfitness.

Later, at page 559, in the *Slochower* case, this Court held:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continual employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. *We hold that the summary dismissal of appellant violates due process of law.*" (Emphasis supplied.)

The statutes requiring the "1931 oath" and those requiring the "1955 oath," in the case at bar, are as summary and therefore as unconstitutional as was the charter provision struck down in *Slochower*.

Both the Washington State Supreme Court earlier, and, in the case at bar, the District Court, tried to uphold the 1955 statutory requirement on the ground that it constituted an investigation of the qualifications (including loyalty) of state employees. However, the procedures involved in this case are very definitely not investigative, but constitute an arbitrary prerequisite for obtaining or continuing to hold state employment. No employee is allowed to give information; instead, he must give the right answer. The automatic and summary manner of dismissal for failure to give the right answer points up the conclusion that this requirement is not an inquiry into the fitness of the employee, or into his loyalty, or a search for information, but is purely a punitive step designed to penalize those who will not or cannot take the oaths.

Perhaps this requirement might exclude some disloyal or otherwise unfit employees, but at the same time it also excludes loyal and fit employees without recourse and/or an opportunity to show their loyalty and fitness. Since indiscriminate classification of innocent with knowing activity offends due process, *Wieman v. Updegraff*, 344 U.S. 183, a meaningful opportunity must be afforded the employee to prove his innocence despite membership in a subversive organization or refusal to take the oath. Such an opportunity is not only lacking in this case but is expressly prohibited by the use of the words "on any

grounds" in the statute. This violates the fundamentals of due process of law, and error was committed by the District Court in not so holding.

The 1931 statute operates even more summarily:

> "Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void."

The District Court fully agreed that the statute is clear and agreed that the operation of the 1931 statute is summary:

> "In view of the mandatory language of the statute there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit that the District Court committed further error, and abuse of discretion, when it declared that the 1931 statute is clear and that it operates automatically, but failed to declare it arbitrary, and hence, unconstitutional as a deprivation of a due process of law.

B. Shifting the Burden of Proof.

Speiser v. Randall, 357 U.S. 513, was a case in which this Court struck down a California oath, less drastic in breadth than the ones questioned in this case, and which was required before property owners could qualify for a tax exemption. This Court held that since the oath in-

fringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer" (*id.* at 529), then, it constituted a violation of due process of law. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure," namely, execute the oath as a condition of obtaining a tax exemption. The procedure was invalid, placing an unconstitutional burden on free speech, and because of this, appellant could not be denied a tax exemption for failure to execute the oath—for refusing to take the first step in an invalid series.

We submit that *Speiser v. Randall* applies to this case in at least two ways. On the one hand, appellants here have been demanded, as they were in *Speiser*, to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive appellants of due process because neither the 1931 nor 1955 statutes offer a hearing as pointed out above. There can be no doubt of the burden on free expression in this case.

On the other hand, we submit that in the case at bar, as in *Speiser*, there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss of employment, etc., achieving the same practical, but constitutionally forbidden, result: The deterrence of free expression which was disallowed in *Speiser*. In that case this Court, at page 526, stated:

"The vice of the present procedure is that, when

> particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, Cf., *Dennis v. U.S.* . . . . provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly. It can only result in a deterrence of speech which the constitution makes free."

The 1955 oath clearly places the burden of persuasion and proof onto appellants, necessarily resulting in a deterrence of speech which the Constitution makes free. It presumes the guilt, and non-employability of all state employees, appellants here, presuming either that they advocate the prohibited doctrines or that they are members of the prohibited organizations. If and only if an appellant comes forth and executes the expurgatory oath will he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and the disloyal. In other words, the oath presumes non-employability and then shifts onto appellants the task of understanding the complex statutory definitions of subversion and then requires appellants to make their declarations, only one answer of at least three possible ones being acceptable.

Nor is this the end of the matter. If appellants execute the 1955 oath, there remains under Washington statutes the possibility of further interrogations, conducted pursuant to the 1951 Washington Subversive Activities Act, and in which appellants are under statutory requirement, on pain of loss of employment, to come forth, under oath, and further to prove the negative of these complex statutory definitions, and otherwise satisfy their inquisitor. Thus, in this case, as in *Speiser*, the burdens of proof and persuasion are placed on appellants throughout the procedure.

But, even so, there is yet another hurdle for the professorial appellants here. They must execute, annually, still another oath, the 1931 oath of undivided allegiance, in order to qualify for their professorial jobs. If they execute the 1955 oath but refuse to execute the 1931 oath, then, the 1931 statute operates summarily, making their teaching contracts "null and void." This total procedure clearly constitutes an unconstitutional burden on free expression and is unconstitutional under *Speiser v. Randall*.

It is no answer to argue—as the District Court did—that *Speiser* does not apply because the oath statutes, as applied in this case, serve to protect the State from an evil sufficiently grave to justify the infringements upon free expression. The lower court's position is defective because the record in this case fails to reveal, as pointed out above, any nexus between appellants and any evil; and further, it is barren of any showing of a subordinating state interest which is compelling. These are the burdens for the State, appellees here, to show. In addition to this error, the

District Court committed another: it failed to follow this Court's analysis in *Speiser*. In *Speiser* this Court held inapplicable the principles of *Garner v. Board of Public Works*, 341 U.S. 716; *Gerende v. Board of Supervisors*. 341 U.S. 56, and *American Comr . Association v. Douds*, 339 U.S. 382, for the reason that in those cases "the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath, he retained his position." It is clear, as shown above, that even though appellants were to execute the oaths here, that act alone would not be conclusive evidence: further loyalty proceedings are expressly authorized under the 1951 Act which has been incorporated into the administrative code of the University. Nevertheless, the District Court cited the cases above, distinguished by this Court in *Speiser*, and then held that, because of the applicability of those cases, "*Speiser* is therefore not controlling."

We submit the lower court committed error and abused its discretion when it dismissed appellants' complaint with prejudice in full recognition of the facts that the statutes here in question shift the burdens of persuasion and proof, without a hearing, and therefore, in violation of due process of law. We submit this erroneous ruling, and its underlying issues, present a substantial federal question.

III.

The District Court Upheld the 1955 Statute in Question Here Even Though It Infringes Upon Freedom of Expression in That It Uses Terms Which Are Vague, Fluid and Indefinite, in Violation of Due Process of Law.

In a series of cases, this Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or to command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at their meaning and to differ as to their applications. *Winters v. New York*, 333 U.S. 507, and *Lanzetta v. New Jersey*, 306 U.S. 451, and cases cited therein. Moreover, the doctrine prohibiting unconstitutional vagueness gives additional protection to the several freedoms established by the First Amendment. *Winters v. New York, supra*, and see Note, The Void For Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960). Thus, this Court, in *Smith v. California*, 361 U.S. 147 at 150-151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

This Court has indicated that an oath, less sweeping in its infringement upon free expression than the one required by the 1955 statute, had a potentially inhibiting effect on speech. *Speiser v. Randall*, 357 U.S. 513. Furthermore, this Court has held that the doctrine announced in

Smith v. California, supra, is fully applicable to oaths which a state may require as a condition of employment. *Cramp v. Florida,* 368 U.S. 278 at 284.

In striking down the vague statute presented by *Winters v. New York,* 333 U.S. 507 at 518, this Court appears to have forecast the advent of this case when it said:

> "The next [case] may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

Thus, it is clear that strict standards against vagueness should be applied in this case involving as it does the penal definitions of "subversive persons" and "subversive organizations," and the threat of a perjury prosecution of professors at a great American University devoted to academic freedom and political expression. Cf. *Sweezy v. New Hampshire,* 354 U.S. 234.

Nevertheless, the District Court, invoking the canon of "reasonable construction"—something it inconsistently refused to do with the vague portions of the 1931 oath—upheld the 1955 oath:

> "It is our view that a reasonable construction of the statutory language does not leave the meaning uncertain or vague—in any event not to the extent that the statute must or should be held unconstitutional in an action such as this. The words used are to be understood in accordance with the ordinary meaning of the words in current usage."

To determine the ordinary meaning of the Washington Statute, the District Court reproduced portions of Webster's New International Dictionary (2nd ed.). As was done in *Lanzetta v. New Jersey,* 306 U.S. 451 at 456, we

set forth the oath required by the 1955 statute. The words in brackets are the words which the District Court held to supply meaning to the word immediately preceding the bracket, and, in the view of the District Court, thereby render that word, and the complete oath, clear and not a subject for speculation, or unconstitutional vagueness.

On the pain of loss of employment, or subsequent perjury prosecution, a professor must now swear that he *understands* the following:

> "Subversive person means any person who . . . advocates, abets [incites, encourages, instigates or countenances; in a disparaging sense] advises or teaches by any means [in any way; possibly, or at all] any person . . . to aid in the commission of any act intended . . . to assist [to lend aid; to help] . . . in the alteration of the constitutional form of government . . . by revolution, force or violence . . ."

We submit that the opinion of the District Court in no way clarifies or makes certain the oath, but rather, its opinion makes the oath broader and the meaning of the oath more fluid and obscure than previously, and that the lower court committed error when it upheld the existence of this vague and fluid oath, because in its entirety, as well as in its several words, it infringes upon freedom of expression in violation of the doctrine set forth in *Smith v. California, supra*, and, in light of the threat of perjury, the oath insures that the dissemination of ideas will be the loser. Thus, we submit that a substantial question of unconstitutional vagueness is presented by this case.

IV.

The Oaths Are Bills of Attainder in Violation of the Constitutional Prohibition Thereof.

The oaths in question in this case are test oaths, punishing appellants legislatively without any adjudicatory process. The 1955 oath is expurgatory, but both oaths function, in this case, to deprive otherwise fully qualified and competent employees of their employment, good consciences and professional integrity.

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, at 320, this Court held that a statute depriving a person "of any rights, civil or political, previously enjoyed, may be punishment . . ." and constituted a bill of attainder. There can be no doubt that the statutes in this case infringe upon, and deprive appellants of "political" rights. In addition, tenure is a "right," and this Court has not considered state employment as a "privilege." Among the unconstitutional deprivations inflicted in *Cummings* were denials of the vote and the opportunity to hold office. In *United States v. Lovett*, 328 U.S. 303, denial of compensation for federal employment was held a sufficient deprivation to invalidate the statute as a Bill of Attainder.

The oaths in this case are not retrospective, but historically, Bills of Attainder need not be retrospective. As Mr. Justice Frankfurter pointed out in concurrence in *Lovett, supra*, at 323, "Frequently, a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or *ex post facto* Law shall be passed.'" This was the court's view

in *Cummings, supra, ex parte Garland,* 71 U.S. (4 Wall.) 333, and *Lovett, supra.*

Recently, the opinions of this Court have erroneously accepted the principle that in order to constitute a Bill of Attainder a statute must be *ex post facto* rather than having been designed to prevent future actions. See, *American Communications Association v. Douds,* 339 U.S. 382, and *Communist Party of the U. S. v. S. A. C. Board,* 367 U.S. 1 at pages 86-87. An excellent writing has fully demonstrated this Court's error:

> "It is, however, a principle belied by the history from which its proponents contend it was culled . . . some English bills of attainder were passed in order to prevent certain types of future conduct on the part of the person or group attainted . . . these historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted." (Comment, The Bounds of Legislative Specifications: A Suggested Approach to the Bills of Attainder Clause, 72 Yale Law J. 330 at 338-339 (1962.))

Thus, it is clear that the opinions of this Court on this subject employ conflicting rationale; some cases, after 1949, have taken a literal approach to the problem, and others have taken a functional approach.

We submit that (1) the writings contemporary with the adoption of the Constitution, and that (2) the pre-Constitutional bills of attainder show that a literal interpretation of this clause, including a requirement of *ex post facto* operation, is error. A broad functional purpose should dominate this Court's future judicial construction of this constitutional provision. We submit the opinions of

this Court make this question substantial and since test oaths historically have been notorious bills of attainder we submit that this case provides this Court an opportunity to clarify its conflicting rationale on the Bill of Attainder provision.

V.

The District Court Upheld State Statutes Which Are Void Because They Violate the Supremacy Clause of the Constitution and Interfere With Foreign Affairs and Attempt to Promote Loyalty to and to Regulate, Restrict and Proscribe Sedition Against the United States, a Field Entirely Within the Province of the Federal Government, and Which the Congress of the United States, by Legislative Enactments, Has Preempted and Wholly Occupied.

This Court has indicated that the Washington Legislature has no more constitutional discretion to command loyalty to the federal government as a condition of the employment of appellants, and others similarly situated, than it has discretion to command loyalty to the government of France. Such legislation infringes on the highest prerogative of the sovereignty of the federal government: the power to command the loyalty of its people. It alone may legislate on questions of *national* loyalty.

> ". . . The United States is not only a government, but it is a national government, *and the only government in this country that has the character of nationality.*" Mr. Justice Bradley concurring in *Knox v. Lee*, 12 Wall 457, at 555. (Emphasis supplied.)

As Chief Justice Marshall stated in the case of *The Exchange*, 7 Cranch 116 at 136:

"The jurisdiction of the nation within its own

territory is necessarily *exclusive and absolute.* It is susceptible of no limitation not imposed by itself. *Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.*

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." (Emphasis supplied.)

In *Pennsylvania v. Nelson*, 350 U.S. 497 at 509, this Court unequivocally held that the Pennsylvania decision on review was "unassailable" in its holding that: "Sedition against the United States is not a *local* offense. It is a crime against the *Nation (id.* at 505). Thus, "Congress having . . . treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem." *(ibid).*

This Court reaffirmed its position in *Uphaus v. Wyman*, 360 U.S. 72 at 76:

". . . In *Nelson* itself we said that the 'precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*'"

Thus, this Court, in *Uphaus*, has made it clear "that a State could proceed with prosecutions for sedition against the State itself" *(ibid)*, but that a state has no power to proscribe the same conduct against the United States, made criminal by the Smith Act.

It should be noted that the Washington Subversive Activities Act is broader than the Smith Act, and there are many sections of both oath statutes under attack here that refer specifically to the United States and cover the same area and proscribe the same conduct prohibited by the Smith Act. It is clear that the State of Washington has no power to command anti-sedition, or undivided allegiance oaths viz-a-viz the United States, and that these portions of the oaths, referring to the United States, have been pre-empted. The District Court's inadequate paragraph on this point is manifestly in error, indicating that it did not reach the real issues, although they had been briefed and argued, when it decided the question:

> "The pre-emption argument based on *Pennsylvania v. Nelson*,[34] need not detain us long, on these facts. The Court's opinion in *Uphaus v. Wyman*[35] indicates that Nelson did not strip the states of the right to guard their own security and a state may legitimately make inquiry and investigate in this area."

We submit this inadequate and erroneous ruling presents a substantial federal question.

VI.

The District Court Upheld the Washington Statutes Requiring Oath Forms A and B Which Are Void Under the Fourteenth Amendment's Due Process Clause, Protecting Appellants Against Compulsory Self-Incrimination.

A. Both the 1931 and 1955 Statutes Establish a Civil "Penalty" or "Forfeiture" Within the Scope of the Fifth Amendment Protection Against Self-Incrimination.

A cardinal tenet of the Anglo-American concept of

procedural due process is freedom from self-incrimination. *United States v. White*, 322 U.S. 694, at 698-699 (dictum), and *Quinn v. United States*, 349 U.S. 155, 161-162 (dictum). Mr. Justice Field, dissenting in *Brown v. Walker*, 161 U.S. 591, at 637, declared:

> "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration."

The state may not coerce the production of either testimony or effects from a party against whom—if produced—such evidence might lead to the imposition of a "forfeiture" or "penalty." *U. S. v. Collins*, 25 Fed. Cas. 545; *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476.

Failure of appellants to execute oath forms A or B will result in loss of their tenure rights, good reputations, credit standing, and even their chosen livelihood for which many have spent years in preparation. (Pre-trial order; Admitted Facts, para. 23 (p. 87), para. 30 (p. 89). This result constitutes a "forfeiture" or "penalty" within the protection of the rule against self-incrimination. *Cohen v. Hurley*, 366 U.S. 117 at 145-149 (dissenting opinion); 35 Tul. L. Rev. 400 at 428 (1961). It is not enough to say that these statutes are not retributive in purpose or are aimed at preserving the State of Washington. Their substance and effect are punitive, and their purported motivation of public protection lies at the core of every criminal law. 35 Tul. L. Rev. 400, 414 (1961). The oaths serve no purpose other than invading constitutionally protected freedoms.

B. The 1955 Statute Is Void as Requiring Plaintiffs, and Others Similarly Situated, to Incriminate Themselves with Respect to Their Own Disloyalty.

Even if the civil jeopardy in which plaintiffs are placed upon presentation to them of the oath forms does not invoke the privilege against self-incrimination, surely potential conviction by the state for a criminal felony does. *Blau v. United States*, 340 U.S. 159; *Hoffman v. United States*, 341 U.S. 479. Yet, this eventuality is exactly what appellants, and others similarly situated, are subjected to by the 1951 statute, as amended, requiring that they execute the so-called "negative disclaimer." Chapter 377, Laws of Washington, 1955, amending Chapter 254, Laws of Washington, 1951 (RCW 9.81.070); the pertinent provision of which reads:

> ". . . Every such person, board, commission, council, department, court or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment."

Since a "subversive person" or member of the communist party or other "subversive" organization is defined *within the same statute* as constituting a felony (RCW 9.81.020-030) and since the avowed function of the legislation—as construed in *Nostrand v. Balmer*, 53 Wn.(2d) 460—is the removal of such "subversives from the state payroll," appellants and others similarly situated, who refuse to sign the oath would necessarily be providing a

"link in the chain needed in a prosecution" under 9.81.020 of the Act, as well as under the Smith Act. *Blau v. United States*, 340 U.S. 159 at 161. Appellants are thus faced with a Hobson's choice. Either they must execute an oath which is vague in its scope (an act in itself offensive to them, causing them emotional anguish in that they must compromise their consciences) and thus face, either because of professional activities or intellectual belief, the genuine possibility of prosecution for perjury by a zealous state, or appellants may choose to refuse to execute the oath, thus facing immediate dismissal, the suspicion of their contemporaries, the taint of disloyalty, and—by their own act of refusal—the possibility of prosecution by a zealous state for the felony of being a "subversive person." There is no middle ground. There are no reservations. There is no opportunity given for explanation by either the statutes commanding the "1931 oath" or those commanding the "1955 oath."

That this probability is a realistic one is corroborated by this Court in *Cramp v. Florida*, 368 U.S. 278, at 286-287. This Court looked to peripheral activity such as that engaged in professionally by appellants:

> ". . . While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."

and in *Slochower v. Board of Education*, 350 U.S. 551 at 557-558:

> ". . . A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The deficiencies of the process are even more constitutionally repugnant as (a) there are other means available, and used, by the state for determining the qualifications of its employees at the University of Washington other than the ritual under consideration, and (b) as shown by appellants in their evidence, the signing or non-signing by them of the ritual has no rational bearing on their fitness to teach. The latter consideration distinguishes this case from the disbarment cases, and from the secondary school teacher cases.

The states do not have "free reign in the choice of means of forcing incriminatory testimony . . ." *Cohen v. Hurley*, 366 U.S. 117 at 129. The "1955 Oath," with the moral, professional and legal compunctions which it presents to the affiant, is certainly such a case where the legislature has strayed beyond its constitutional bounds.

We submit the time has come for this Court fully to incorporate the privilege against self-incrimination into the due process clause of the Fourteenth Amendment, and that this issue is substantial.

VII.

The District Court Improperly Refused to Declare Constitutional Rights of Appellants Regarding the 1931 Oath and Committed Error in Dismissing Appellants' Complaint With Prejudice.

A. The District Court Committed Error in Not Declaring Appellants' Constitutional Rights Regarding the 1931 Oath.

It is not clear whether the lower court invoked the abstention doctrine. It appears that the lower court believed it had absolute power to grant or deny declarative relief. In either event, this Court has made it absolutely clear that a United States District Court does not have untrammeled discretion to grant or deny declaratory relief, or automatically to invoke the doctrine of abstention, simply because the constitutionality of an unconstrued state statute, or an ambiguously worded state statute, is called into question. This much was implicit in *Harrison v. NAACP*, 360 U.S. 167, and this Court made the matter explicit in *NAACP v. Bennett*, 360 U.S. 471, and see, *Romero v. Weakely*, 226 F.(2d) 399 (C.A. 9th Cir. 1955). Nor has this court required that a complaint be dismissed when such questions arise. This has been clear since *Doud v. Hodge*, 350 U.S. 485 at 487:

> "... This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state court had not yet rendered a clear or definitive decision as to the meaning of federal constitutionality of the statute."

Given the above holdings, and *County of Allegheny v.*

Frank Mashuda Co., 360 U.S. 185, it is obvious that a District Court cannot, without committing error and abusing its discretion, refuse declaratory relief and invoke the doctrine of abstention where the legislative language is clear or where only one reasonable interpretation of the words is possible. In these circumstances it is the duty of the District Court to decide the constitutional question. *Toomer v. Witsell*, 334 U.S. 385. This duty is the logical corollary of the holding in *Harrison v. NAACP*, 360 U.S. 167. Moreover, this is precisely what has been done in *Schempp v. School District of Abington*, 177 F. Supp. 398 (E. D. Pa. 1959), without adverse criticism from this Court, 364 U.S. 298.

Even moreso is it the duty of a District Court to decide the constitutional question presented to it when the District Court itself has concluded that the statutory language is clear, as the lower court did in this case with respect to the denial of a hearing and the summary operation of Section 4 of the 1931 oath statute. The lower court declared:

> "In view of the mandatory language there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit, therefore, that the District Court committed error and abused its discretion when it refused a declaration on the constitutionality of Section 4 of the 1931 oath enactment simply because Section 1 thereof contained in the court's view, some few words which possessed some degree of ambiguity which had not been resolved by the Washington courts.

Furthermore, we submit that the lower court viewed its power as extending so far as to deny its own jurisdiction, and further, to invoke abstention as untrammeled and without boundaries, including the power to defeat the very purpose of the Declaratory Judgment Act, the jurisdictional statutes: 28 USC 1331 and 1343 (3), and the civil rights statute 42 USC 1983 involved in this case. The lower court stated that the granting of declaratory relief was a matter of sound discretion committed to the District Courts, and:

> "Accordingly, in the absence of a concrete factual showing that any plaintiff or any member of the class of state employees here represented *has suffered actual injury by reason of the application* of the oath of allegiance statute . . . this court will decline to render a declaratory judgment . . ." (Emphasis supplied.).

Since a declaratory judgment action necessarily must be brought before "actual injury by reason of the application" of the oath to appellants, the District Court has set an impossible burden upon their shoulders. Appellants cannot show *actual injury* before the statute has been actually applied to them. Yet, appellants cannot obtain a declaration of rights, under this ruling, without subjecting their rights to actual injury. Thus, the position of the District Court completely defeats the purpose of Congress when it enacted the jurisdictional statutes, the civil rights statute, and the Declaratory Judgment Act.

> "One of the highest offices of declaratory procedure is to remove uncertainty and insecurity from legal relations, and thus clarify, quiet and stabilize them before irretrievable acts have been undertaken." (*De-*

laney v. Carter Oil Co., 174 F.(2d) 314 at 317 (C.A. Okl. 1949), cert. den. 338 U.S. 824.)

This is also the view of the Ninth Circuit:

> "The purpose of the Declaratory Judgment Act is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." *(Shell Oil Co. v. Frusetta*, 290 F.(2d) 689 at 693 (C.A. 9th Cir. (1961)).

We submit that the lower court abused its discretion when it abandoned this view and that it committed error in refusing to rule on the constitutionality of the 1931 oath statute for the reason that appellants had not yet shown any actual injury.

In addition, we submit that the following words with respect to the 1931 oath are clear and can have only one reasonable interpretation, and that the lower court forthrightly should have ruled this oath unconstitutional as an infringement upon the First and Fourteenth Amendments, and the Supremacy clause:

> "I solemnly swear . . . that I will . . . by precept and example promote . . . undivided allegiance to the government of the United States."

Indeed, the District Court itself must have believed that these, and other, words of the 1931 oath were clear because at the beginning of its opinion on the 1931 oath, the court refers back to its discussion of the First Amendment with respect to the 1955 disclaimer oath. It stated that:

> "Insofar as the arguments heretofore considered

with respect to the loyalty oath are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the lower court did not invoke abstention on these points and that it ruled erroneously on the substantive questions. However, if it be the view that the lower court did invoke abstention, then, we submit that it abused its discretion in so doing, as the above quoted paragraphs clearly demonstrate and that substantial questions are presented. *NAACP v. Bennett*, 360 U.S. 471; *Toomer v. Witsell*, 334 U.S. 385, and *Cf. Chicago v. A. T. & S. F. Ry.*, 357 U.S. 77.

B. The District Court Committed Error in Dismissing Appellants' Complaint Assuming, Arguendo, That Abstention Was Properly Invoked.

The doctrine of abstention does not raise a question of power, but rather, a question of judicial discretion. *Catoggio v. Grogan*, 149 F. Supp. 94 (D.C. New Jersey 1959). The doctrine is designed to serve the purposes of comity, allowing a state court to resolve questions of statutory construction, where state statutes are reasonably and fairly open to doubt. But, as this Court has declared:

> ". . . This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention, . . ." *(Harrison v. NAACP*, 360 U.S. 167 at 177).

Thus we submit that the District Court committed error when its final order certified that appellants' "complaint be and it hereby is dismissed with prejudice."

VIII.

It Is a Substantial Question Whether Washington's Legislature Has Power to Disqualify Every Citizen Absolutely From the Profession of Teaching, Public and Private, on the Sole Ground That He Has Refused to Execute the Oath of Undivided Allegiance.

It is beyond doubt that the profession of teaching is an old, honorable and lawful one, and that its calling is within the "liberty" protected from unwarranted deprivation by the Due Process clause of the Fourteenth Amendment:

> "Plaintiff in error taught this language [German] in school as part of his occupation. His right thus to teach and the rights of parents to engage him so to instruct their children, we think, are within the liberty of the (Fourteenth) Amendment." *(Meyer v. Nebraska*, 262 U.S. 390 at 400 and see, *Farrington v. Tokushige*, 273 U.S. 284, and *Pierce v. Society of Sisters*, 268 U.S. 510.)

Appellants admit, as indeed they must, that Washington may submit the profession of teaching to regulations, but those regulations must be reasonable and rationally connected with fitness for teaching. *Douglas v. Noble*, 261 U.S. 165; *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 at 239, footnote 5.

In this case, the oath requires that all teachers have closed minds on certain subjects, e.g. allegiance to government, regardless of their consciences or religion. We submit that such a requirement cannot constitute a rational relationship to fitness for the profession of teaching. This Court declared as much in *West. Va. v. Barnette*, 319 U.S. 624.

In the *Barnette* case, this Court disallowed States power to compel children to pledge allegiance to the flag of the United States. Making a sharp distinction between education and indoctrination, this Court defined the question there as follows:

> "... the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty which tend to inspire patriotism and love of country .... Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to arouse loyalties constitutionally may be a short-cut by substituting a compulsory salute and slogan. ..." (At p. 631)

If a state cannot require its school children compulsorily to perform this act of allegiance (albeit not "undivided"), we submit that it cannot be said that a broader and more severe oath, the 1931 oath, is a rational qualification for teachers. Even if the oath were rational for first grade teachers, which we do not admit, appellants are university professors whose function it is to inspire their students toward the discipline of an unfettered search for truth, no matter what conforming idolatry might be shattered in the process.

> "... But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Va. v. Barnette*, 319 U.S. 624 at 642.

To hold that the 1931 oath, however construed, is rationally related to the fitness of a university professor is to deny religious and academic freedom, and to make a mockery of our great universities. The irrelevance of this oath to fitness to teach at the university, indeed its hostility to true qualifications of fitness, is clearly revealed by the past practice of university administrators, in part, discussed below in question nine. We submit that this question is substantial and it is not foreclosed by such cases as *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82, or *In re Summers*, 325 U.S. 561, which relied upon *U.S. v. Schwimmer*, 279 U.S. 644, and *U.S. v. Macintosh*, 283 U.S. 605, and which were overruled in *Girouard v. U.S.*, 328 U.S. 61.

IX.

The District Court Committed Error in Denying Standing to the Alien Appellants to Challenge the 1931 Oath.

The lower court erroneously cited only one case: *Poe v. Ullman*, 367 U.S. 497, as justification for its holding that: "The alien plaintiffs may not challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced." The cited case does not control because the facts are not present in the case at bar for *Poe v. Ullman* to be operative. There is absolutely nothing in the record to show that the 1931 oath "has never been enforced" as to aliens. To the contrary, the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors at the University of Washington. (P-T.O. 77). Thus, the

lower court's holding assumes a state of facts not found in the record, the possible existence of which is expressly contradicted by the record and *Poe v. Ullman* is not operative here. Sifice some version of the oaths consistently has been required of aliens, then it is clear that they have standing to challenge the oaths under the rule of *Cramp v. Florida*, 368 U.S. 278, and that the District Court committed error in denying alien appellants this right.

Furthermore, the holding of the District Court necessarily demands that it presently approve an invidiously discriminatory past practice of University officials, which, in operation, amounts to an unconstitutional denial of the equal protection of the laws, thereby abridging the Fourteenth Amendment. This Court has long held that, although a state statute may be fair on its face and impartial in its appearance, yet, if it is applied and administered with an unequal hand to persons in like circumstances, then, it is a denial of equal protection of the laws. The Fourteenth Amendment clearly requires equal operation of the laws upon all persons who are in like circumstances. *Yick Wo v. Hopkins*, 118 U.S. 356; *Soon Hing v. Crowley*, 113 U.S. 703; *Chy Lung v. Freeman*, 92 U.S. 275, and *Maxwell v. Bugbee*, 250 U.S. 525. The unconstitutional past practice of the University administration was that of administering the statutorily-worded 1931 oath unevenly to professors, invidiously discriminating between citizens and aliens (P-T.O. 77). This practice was relied upon by the District Court as supporting its holding that alien appellants have no standing.

In addition, the past practice discriminated within the alien class itself, in not requiring a uniform oath of all aliens. Thus, even under the strict test of *Goesaert v. Cleary*, 335 U.S. 464, the past practice is unconstitutional, not only because it discriminated between aliens and citizens seeking the same position, but because it discriminated among the class of aliens seeking the same position, there being no uniform oath applicable alike to all aliens. It works an "irrational discrimination between . . . groups of persons . . ." *Goesaert v. Cleary*, 335 U.S. 464 at 466. Yet, the District Court relied upon the validity of this unconstitutional past practice for support for its ruling. This is clear error, for the lower court's holding rests on an unconstitutional premise; and cannot be allowed to stand. *(Takahashi v. Fish and Game Commission*, 334 U.S. 410 at 420: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws.")

Whatever may have been the past practice at the University, it is clear that the present administration's policy —ignored by the lower court—no longer is that of following the unconstitutional past practice. For example, one alien appellant, in this case, was actually demanded to sign the 1931 oath, statutorily unmodified. (See Ex. 17); in addition, President Odegaard stated that, on May 28, 1962, he demanded of "all employees of the University of Washington that they execute either Oath Form A or B, whichever might be applicable to them" (P-T.O. 91),

and finally, there is the agreed fact—ignored by the District Court—that ". . . pursuant to statute, a demand was made by President Odegaard . . . that all members of the teaching staff, including aliens, execute the Oath Form A here in question." (P-T.O. 78). We submit that alien appellants do have standing to challenge the 1931 oath; that the present University administration's policy is to administer the 1931 statute with an even hand regarding both aliens and citizens, and that this substantial question was clearly misdecided by the lower court.

X.

The Interest of Student-Appellants in Academic Freedom Is Adequate to Afford Them Standing to Sue.

This Court has recognized that academic freedom is protected by the First and Fourteenth Amendments, and that a professor has standing to invoke those Amendments when his interest in academic freedom is unwarrantedly infringed upon by a state. *Sweezy v. New Hampshire*, 354 U.S. 234. Furthermore, this Court, rightly, has recognized that academic freedom has two sides and that it necessarily involves students as well as professors:

> ". . . When academic teaching-freedom *and its corollary learning-freedom*, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . *into this constitutionally protected domain.*" *(Barenblatt v. U.S.*, 360 U.S. 109 at 112) (emphasis supplied)."

Despite the above, the District Court, in its Order on Motion to Dismiss, dismissed the student-appellants from

this action. Yet, this case directly affects the quality of learning-freedom afforded students at the University of Washington. However, the lower court held that the student-appellants had "no direct legal interest in the requirement imposed on the teaching personnel." In so doing it cited three cases, none of which was discussed, nor was its citation of any apposite.

The District Court did not discuss, distinguish, or determine why the following cases, supporting student standing and argued to it, were not applicable to this case: *Engel v. Vitale*, 370 U.S. 421 (parents allowed to assert the rights of their children to attack a prayer required in the schoolroom); *Adler v. Bd. of Ed.*, 342 U.S. 485 (the parental assertions of the rights of their children in academic freedom were put forth to contest the validity of New York's Feinberg Law which was upheld by this Court over a dissent by Mr. Justice Frankfurter wherein he would have denied review on the basis of their lacking an interest to afford standing): *Hamilton v. Bd. of Regents*, 293 U.S. 245 (students at a state university had standing to contest a mandatory ROTC program); *Pierce v. Society of Sisters*, 268 U.S. 510 (the society asserted the constitutional rights of students to be educated in a private sectarian school); *Waugh v. Bd. of Trustees*, 237 U.S. 589 (student who applied for admission had standing to challenge a university's ban on fraternal allegiance).

In *Shelton v. Tucker*, 364 U.S. 479 at 487, this Court declared that "the vigilant protection of constitutional freedoms is nowhere more vital than in the Community of

American schools." And in another significant case, this Court said:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (emphasis supplied). *(Sweezy v. New Hampshire*, 354 U.S. 234 at 250).

We submit that the oaths in this case create "an atmosphere of suspicion and distrust," particularly when a student's testimony might be the subject of subpoena and afford a link in the evidence offered in a prosecution of his professor for falsely signing these oaths. Thus, there is an infringement upon both aspects of the constitutionally protected domain of academic freedom. Inevitably, these oaths, if applied, will shrink the domain of learning-freedom afforded students at the University of Washington. We submit that the student interest in academic freedom in this case presents a substantial question of their standing to sue.

CONCLUSION

The issues presented in this case go to the heart of democratic processes in America. Today, when man has so much to learn about himself and his neighbors, it is vitally important to keep open the channels of academic and public discussion concerning the vital and troublesome questions which face the people of our nation in these difficult times. If upheld, the exercise of power by Washington's legislature in demanding the oaths in question here will block discussion of vital issues in the academic community where novel ideas and bold plans must be generated and evaluated. No legitimate interest of the state justifies the breadth of suppression of free expression, and the curtailment of the search for truth, which will occur if these oaths are applied to the University of Washington.

Universities and colleges do not possess or teach the whole truth. They are engaged in the quest for truth. For that reason their scholars must be left free to examine all facts and ideas, the unpleasant, the distasteful, and the dangerous ones, and even those regarded as erroneous by a majority of the Washington legislature. If a professor's theories fail to encompass the whole truth and do not conquer in detail every nuance of his subject, they may, nevertheless, profoundly broaden and alter the picture given by the last scholar in the field.

To a scholar, unchallengeable dogma and hypothesis are fundamentally incompatible with the very life spirit of a university. "The concern of its true scholar is not merely to add and revise facts in relation to an accepted

framework, but to be ever examining and modifying the framework itself." *Sweezy v. New Hampshire*, 354 U.S. 234 at 263 (concurring opinion). Some people believe that communists have become prisoners of dogma and no longer are intellectually free. Hence, these people argue that communists are unfit to teach at a university and can be excluded from the company of true scholars. This test may have some validity. But, if it does, by that same token, every professor who subscribes by oath or affirmation to the body of beliefs and dogmas officially, but unconstitutionally, set forth by the Washington legislature in the two enactments in issue in this case is likewise a prisoner of dogma. He is not intellectually free, and should be disqualified from teaching at a university for the same reason that a communist is disqualified.

In this case, the State of Washington demands that its otherwise fully qualified professors take thought-conforming and action-conforming oaths as a condition of their continued employment. Professors, under these oaths, are forbidden to discuss or to teach certain doctrines. The University of Washington is forbidden to employ believers in certain political or economic creeds. Thus, these enactments present great dilemmas to the academic community, for, in fact, they prevent that community from following the free ways which are at the very core of its being. If a professor abides by these enactments, then, by as much as he observes the law, he ceases being involved in a truly intellectual endeavor. If the professor disobeys these enactments and carries out his professorial calling, then, he is a lawbreaker.

Immersed in these disturbing perplexities, we submit that this case presents substantial federal questions which are important and that they merit the fullest consideration by this Court.

Respectfully submitted,

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June, 1963

APPENDIX A

Opinion Below and Final Order

Opinion Below

United States District Court
Western District of Washington
Northern Division

LAWRENCE W. BAGGETT, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NORTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Plaintiffs,

No. 5598

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ALBERT MURPHY, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Defendants.

MEMORANDUM OPINION

Before JERTBERG, *Circuit Judge*, and LINDBERG and BEEKS, *District Judges*

LINDBERG, District Judge:

This is a class action in which sixty plaintiffs employed

at the University of Washington in both teaching and non-teaching positions seek declaratory and injunctive relief against the enforcement of two Washington statutes by defendants, the President of the University, the members of the Board of Regents, and the Attorney General of the State of Washington. The statutes under attack are Chapter 377, Laws of 1955, amending the Subversive Activities Act of Washington, Chapter 254, Laws of 1951, herein sometimes referred to as the "loyalty oath" statute; and Chapter 103, Laws of 1931, herein sometimes referred to as the "oath of allegiance" statute.

It is alleged that, as applied to plaintiffs, these statutes are violative of Article I, Section 10, and the First, Fifth, and Fourteenth Amendments of the Constitution of the United States. The court is asked to declare these statutes unconstitutional and to issue a permanent injunction against their enforcement.

Upon the filing of the complaint a three-judge district court was convened pursuant to the mandate of 28 U.S.C., §§ 2281 and 2284, and on July 13, 1962 heard arguments on plaintiffs' motion for an interlocutory injunction and defendants' motion to dismiss. The motion to dismiss was denied and a temporary injunction was issued pending a full hearing on the merits.

Pretrial conferences were held and an extensive pretrial order, approved by all parties, has been entered, containing a number of stipulations of fact relating to the events, the background, and academic setting of the controversy. Pursuant to stipulation by the parties no oral testimony was presented but statements of several persons

were set forth in the pretrial order and a number of exhibits were admitted without objection. The issues of law have been carefully and extensively briefed and orally argued by counsel. This court has jurisdiction under 28 U.S.C., §§ 1331 and 1343(3), and 42 U.S.C., § 1983, relating to alleged deprivation of civil rights under color of state law.

BACKGROUND OF THE CASE

Both of the Washington statutes involved require the taking of an oath by employees of the State of Washington. Although the oath of allegiance is required of teachers only, the 1955 statute, which is an amendment to the Subversive Activities Act,[1] provides that every employee of the State of Washington must state under oath whether or not he or she is a member of the Communist party or other subversive organization, and that refusal to answer on any ground shall be cause for immediate termination of such employee's employment or refusal to accept his or her application for employment. The terms "subversive person," "subversive organization" and "foreign subversive organization" as used in the Act are defined therein and the Communist party is declared to be a subversive organization.

While the oath of allegiance statute has not previously been attacked the loyalty oath statute has been the subject of prior litigation[2] commenced in the Superior Court of the State of Washington by Howard Nostrand and Max

1. Chapter 9.81, Revised Code of Washington.

2. *Nostrand v. Balmer*, 53 Wn.(2d) 480; *Nostrand v. Little*, 362 U.S. 474; *Nostrand v. Little*, 58 Wn.(2d).111; *Nostrand v. Little*, 368 U.S. 436.

Savelle, tenured professors at the University of Washington, who are also plaintiffs in the instant case. The Supreme Court of Washington upheld the constitutionality of Chapter 377, Laws of 1955 against attack under both state and federal constitutions, with the exception of one section not here relevant, which section was declared to be unconstitutional but severable. On appeal to the United States Supreme Court that court vacated the decision of the Supreme Court of Washington and remanded the case for a determination whether state employees who refused to sign the oath would be entitled to a hearing at which the refusal to sign the oath could be explained or defended. On the remand the Washington court held that the statutes requiring the loyalty oath did not afford such a hearing but that professors Nostrand and Savelle, as tenured professors, would be entitled to such a hearing pursuant to the terms of their employment contract and under the rules promulgated by the Board of Regents in accordance with their statutory authority. An appeal was again taken to the United States Supreme Court which, in a *per curiam* decision handed down January 22, 1962, granted the Attorney General's motion to dismiss "for want of a substantial federal question." Whereupon the injunction staying enforcement of the loyalty oath statute, which had been in effect since 1955, was dissolved.

Thereafter, in a memorandum issued on May 28, 1962 by President Odegaard pursuant to directions from the Board of Regents, notice was given to all University employees that they would be required to sign an oath which would fulfill the requirements of the Washington Sub-

versive Activities Act, and October 1, 1962 was set as the final date for execution of such oath. Printed forms of an oath in the following language, which differs from that involved in the prior litigation, have been distributed to employees of the University:

> "I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and
>
> "I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
>
> "I understand that this statement and oath are made subject to the penalties of perjury." (Exhibit #2)

The sections of the statute referred to in the oath are printed on the reverse side of the oath form as set forth in the footnotes.[3]

---

3. *Subversive Person Ineligible for Public Employment.* "No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (RCW 9.81.010 (5))

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Wash-

The oath of allegiance for teachers is prescribed by Section 1 of Chapter 103, Laws of 1931[4] and Section 2 of said Chapter,[5] states that every professor, instructor or teacher employed by any state institution of higher learning or any school supported in whole or in part by public funds shall subscribe to the oath or affirmation required of all public school teachers before entering upon the discharge of his duties.

The President and Board of Regents of the University of Washington have given notice to all teaching personnel that they are required to subscribe to the oath of allegiance in addition to the loyalty oath. It is not disputed that defendants intend to exact compliance with the provisions of both oath statutes; that they have taken administrative steps to effect such compliance; and have given notice to all members of the University staff that in the event of failure of an employee to comply by subscribing to the

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ington, or of any political subdivision of either of them, by revolution, force or violence." (RCW 9.81.010 (2))

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3))

Communist Party Declared to be Subversive Organization.

"The communist party is a subversive organization within the purview of chapter 9.81 and membership in the communist party is a subversive activity thereunder." (RCW 9.81.083)

Oath Required of Employees of State of Washington.

"... Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

4. RCW 28.70.150.

5. RCW 28.76.230.

oath or oaths required of him by October 1, 1962, "employment will be terminated 30 days later as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign."[6] Nor is it disputed that all plaintiffs have refused to sign the oaths required of them, alleging that the statutes are violative of their rights under the United States Constitution. We therefore find that a justiciable controversy exists as to which this court has jurisdiction. *Bell v. Hood*, 327 U. S. 678.

Most of the plaintiffs, including three tenured professors who are aliens, are members of the teaching faculty and are required by the Washington statutes to subscribe to both the loyalty oath and the oath of allegiance. Non-teaching employees are required to sign only the loyalty oath. Some of the plaintiffs are research associates of various ranks — one is a micrometeorologist, another is an assistant editor of the University of Washington Press, two are employed as secretary-typists, and another is a detailer in the cyclotron department. All plaintiffs are suing both for themselves and for others similarly situated.

CONTENTIONS

The basic claims of plaintiffs are as follows:

1. That the statutory requirements of oath-taking as a condition of employment by the state are unjustifiable invasions of rights of freedom of speech, belief, and association, and freedom of religion, all as protected by the

6. Memorandum to All Members of University Staff, distributed by the office of the President on 28th day of May, 1962; Pretrial Order, pages 85-87.

First and Fourteenth Amendments to the Constitution of the United States.

2. That the oath requirements operate as a prior restraint upon free speech and free association and are destructive of academic liberty.

3. That the language of the oaths is vague and uncertain.

4. That the statutes violate the Fifth Amendment privilege against self-incrimination; and that the requirement of a positive act of oath-taking, on pain of loss of employment, unconstitutionally shifts the burden of proof on the question whether they are subversive persons.

5. That the statutes and administrative action contemplated thereunder provide for summary and automatic discharge on grounds unrelated to fitness for employment and would deprive non-tenured employees of reputation and property rights without the protections of procedural due process, and are therefore an arbitrary and discriminatory exercise of state power.

6. That the 1955 loyalty oath statute is a bill of attainder.

7. Invoking the supremacy clause, plaintiffs argue that these statutes deal with sedition, a subject pre-empted by the Congress, under the holding of *Pennsylvania v. Nelson*, 350 U. S. 497. Plaintiffs further claim that the oath of allegiance statute interferes with the conduct of foreign relations in that it sets a condition for employment as a teacher in the state university which, in effect, excludes foreign scholars from teaching at the university.

Other arguments are addressed to the wisdom of the

legislation and will not be discussed.

Defendants, on the other hand, contend that it is within the power of the State of Washington to require a loyalty oath as a condition of employment by the state for the purpose of safeguarding the state from disloyalty; and to prescribe the taking of an oath of allegiance as a qualification for fitness to each. They deny that the oath requirements invade any constitutionally-protected rights of plaintiffs, deny that the oaths are vague and uncertain, and argue that it is not apparent in the present context of events that any employee will be denied procedural due process in any future proceeding for termination of employment for failure to subscribe to the required oath or oaths.

DISCUSSION

We wish to emphasize at the outset that this is a declaratory judgment action. Enforcement of the statutes by University officials, while clearly intended, is still prospective as a result of this litigation. The court granted a temporary restraining order on June 25, 1962. With the acquiescence of the defendants the restraining order was continued as a temporary injunction pending trial and is still in effect, pending the decision of the court. Consequently, although the date of October 1, 1962, set as the deadline date for University employees to subscribe to the oath, has come and gone, none of the plaintiffs has been dismissed for refusal to sign the oath or oaths. Thus the dismissal policies and hearing procedures which would actually be put into effect by the University administra-

tion are not known, which causes the "due process" issues to be speculative and difficult of resolution. The principal questions, however, must necessarily relate to the validity of the statutes as construed on their face and in the light of surrounding circumstances, and to these issues we direct our primary attention.

Plaintiffs have elected to treat the two oath statutes together in large part. In view of the conclusions we have reached we shall consider the statutes separately. All of the contentions of the parties which merit consideration will be treated in the course of discussion of the issues raised as to each statute.

The Loyalty Oath Statute

In considering the provisions of the 1955 amendment to the 1951 Subversive Activities Act, which form the basis for the loyalty oath requirement, we are not concerned with the effectiveness or the wisdom of loyalty oaths. We perceive the truth of the remark of Justice Black, concurring in *Speiser v. Randall*, 357 U. S. 513, 532:

> "I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government."

But questions of wisdom and effectiveness are matters of legislative and not judicial concern.

Was the legislation within the power of the Washington legislative body to enact? It cannot be questioned that a state has power to safeguard the public service from dis-

loyalty;[7] and the right of the state to inquire of its employees concerning their loyalty has been recognized in a number of cases.[8] A statute enacted for such a purpose "comes to us encased in the armor wrought by prior legislative deliberation,"[9] and we are mindful of "the deference due to legislative determination of the need for restriction upon particular forms of conduct."[10]

The 1951 statute was enacted by the legislature pursuant to executive request following a report of a joint fact-finding committee of the Washington legislature investigating un-American activities in the State of Washington.[11] It must be presumed that legislative findings sufficient to justify the enactment of the 1951 statute were made, and that the 1955 amendment was supported by the same findings. We are therefore unable to accept plaintiffs' argument that there has been no showing of a public danger sufficient to justify the enactment of restrictive legislation.

The loyalty oath is required of every state employee or applicant for state employment. But plaintiffs argue vehemently that loyalty oaths may not be required of academic personnel of a university; that such a condition is "utterly inconsistent" with the necessities of their role in the academic community as discoverers and transmitters of knowledge and truth; in effect, that they stand in a

7. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288. *Uphaus v. Wyman*, 360 U.S. 72, 76-77.

8. *Gerende v. Board of Supervisors*, 341 U.S. 56; *Garner v. Board of Public Works*, 341 U.S. 716; *Beilan v. Board of Education*, 357 U.S. 399; *Lerner v. Casey*, 357 U.S. 468; *Adler v. Board of Education*, 342 U.S. 485.

9. *Bridges v. California*, 314 U.S. 252, 261.

10. *American Communications Ass'n v. Douds*, 339 U.S. 382, 401.

11. *Nostrand v. Balmer*, 53 Wn.(2d) 460, 465.

category apart. We cannot agree that members of state institutions of higher learning are constitutionally immune from inquiry into matters within the legitimate legislative concern, in the public interest.[12]

The next question is whether there is a rational relationship between the condition imposed by the statute and the particular public service rendered by those plaintiffs whose duties are of an academic nature. The essentiality of the preservation of universities as centers of thought, research and teaching can never be doubted. Nor can we overemphasize the absolute necessity of academic freedom as a vital force, both in the effective functioning of these great educational institutions and in the maintenance of our democratic society.[13] Teaching and research personnel must do their work in an atmosphere of free inquiry, free of external restraints on thought, and equally free of secret restraints on their individual intellects. Academic freedom of inquiry and the fearless pursuit of truth and knowledge, wherever they may lead, is not possible for an individual who is fettered by dedicated membership in an association whose purpose is violent overthrow or destruction of our constitutional form of government, the very guardian of our rights and freedoms. Such an individual is incapable of fearless and untrammelled inquiry and creative thought because he is bound by a rigid adherence to an ideology governed by the political expediencies of its revolutionary purpose rather than by dedication to the verities wherever they may be discovered. Academic personnel should be unfettered by the restraints on free thought which such an

12. See *Barenblatt v. United States*, 360 U.S. 109, 112.
13. See *Sweezy v. New Hampshire*, 354 U.S. 234.

association imposes if they are to effectively perform their duties in the academic world. Education, not indoctrination, is the function of a university teacher.

The legislative declaration that one who is under the discipline of membership in a subversive organization, as defined in the statute, is unfit for a position of trust in the public service[14] is supported by reason and experience, and is most poignantly applicable to positions of trust in a state university, where an absence of both institutional and associational restraint on free thought and inquiry is of the essence of effective service. It is unnecessary to dwell at length on the influence exerted by university teachers in the molding and development of young minds. It is well recognized that inquiry into the moral and intellectual fitness of a teacher is relevant to the question of his fitness to teach.[15] We cannot say that application of the loyalty oath provisions to academic personnel of a state university is without rational relationship to the purposes of the entire legislative enactment, which was within the power of the State of Washington to enact.

May the desired information be elicited by use of a form of disclaimer oath as a substitute for individual inquiry of each employee? We think it may, if the oath is sufficiently limited[16] to the area of legitimate state concern. In an institution as large as the University of Washington, to conduct personal interviews of all present and prospective employees concerning their loyalty would be

14. RCW 9.81.060.

15. *Shelton v. Tucker*, 364 U.S. 479; *Adler v. Board of Education*, 342 U.S. 485.

16. *See Gerende v. Board of Supervisors*, 341 U.S. 56; *Garner v. Board of Public Works*, 341 U.S. 716.

administratively burdensome and might be subject to abuses. In lieu of such inquiry the university officials have elected to require a sworn statement, narrowly limited to the precise matters of legitimate state concern. So limited, the oath serves the same purpose as individual inquiry.

But plaintiffs assert that the requirement that they sign the form of oath presented to them, in the language in which it is couched, unjustifiably invades their First Amendment freedoms of speech, belief and association, and will tend to discourage the exercise of constitutionally-protected rights of association and exchange of ideas, incidentally impairing their performance of their academic function. Such rights, whether in relation to academic liberty or otherwise, are to be accorded a high degree of constitutional protection, but they are not "absolutes." It is sometimes necessary to reconcile these constitutional protections against the exercise of valid governmental powers by a "balancing" of the interests involved.[17] Recent cases have made clear that a substantial invasion of such rights may not be justified by reliance on a state's right to inquire into the fitness and competency of teachers.[18] But we find no such invasion of constitutional rights by the statute and oath in question here. A careful consideration of the language of the oath confirms the impression left by a cursory reading; namely, that the oath does not require any statement as to the political, religious, economic or social beliefs of the person subscribing thereto, nor does it require him to refrain from

17. *Konigsberg v. State Bar*, 366 U.S. 36.

18. *Cramp v. Board of Public Instruction*, 368 U.S. 278; *Shelton v. Tucker*, 364 U.S. 479.

membership in any kind of association whatever, *except* those associations which have an aim or purpose to overthrow, destroy or alter the constitution and government of the state or nation by revolution, force or violence.

The employee is not asked to reveal all his associational ties, past and present, as in *Shelton v. Tucker*,[19] nor is he asked, as in *Cramp v. Board of Public Instruction*,[20] to swear that he has not "in the unending past ever knowingly lent (his) 'aid' or 'support,' or 'advice' or 'counsel' or 'influence' to the Communist party;" nor is he asked, as in *Sweezy v. New Hampshire*,[21] to make statements about matters of private conscience which are not clearly included within the scope of legislative concern. Plaintiffs' reliance on these cases is misplaced. In all three the requirement on which employment was conditioned is distinguishable from the condition here imposed. Plaintiffs here are simply required to state that they do not now and will not in the future engage in the proscribed subversive conduct nor become or remain a member of a subversive organization as defined in the statute. The Washington statute is not concerned with past membership, and the Washington court has held that the element of scienter is implied in every clause of the pertinent statutory provisions.[22] If denial of state employment to a "subversive" person, as defined in the statute, constitutes any invasion of constitutional rights of speech and association, the restriction certainly goes no further than may be justified, under "balancing" principles, by the state's interest

19. 364 U.S. 479.
20. 368 U.S. 278, 286.
21. 354 U.S. 234.
22. *Nostrand v. Balmer*, 53 W.(2d) 460, 484.

in self-preservation and in the qualifications and fitness of its employees.[23]

Plaintiffs further assert that the loyalty oath requirement operates as a prior restraint upon free speech and association and is destructive of academic liberty. This contention is bound up with the further argument that the structure and language of the oath is vague, leaving plaintiffs uncertain of the sweep of the statute and the kind of conduct or association which will disqualify an individual from public employment. Plaintiffs, relying on *Cramp, supra*, voice apprehension that at some future time, as a result of alleged vagueness, conduct and association which is nonconforming or which finds disfavor in the prevailing community sentiment, will be found to be "subversive" under the terms of the statute. It is our view that a reasonable construction of the statutory language does not leave the meaning uncertain or vague—in any event not to the extent that the statute must or should be held unconstitutional in an action such as this. The words used are to be understood in accordance with the ordinary meaning of the words in current usage.

Plaintiffs have singled out the words "abet," "assist," and "by any means" for criticism on the score of vagueness. According to Webster's New International Dictionary, 2nd edition, the ordinary meaning of those words in current usage is:

> "abet . . . To incite, encourage, instigate, or countenance;—now used chiefly in a bad or a disparaging sense; as, to abet the commission of a crime."

23. See *Uphaus v. Wyman*, 360 U.S. 72, 80.

"assist . . . To lend aid; to help."

"by any means . . . In any way; possibly; at all."

With these definitions in mind the meaning of "abet," "assist" and "by any means," as used in the statute, is free of ambiguity. It is not unreasonable to ask an employee to state that he "understands and is familiar with" the contents of the statutory provisions printed on the reverse side of the form. It is only necessary that he understand the concepts reasonably and ordinarily conveyed by the language. He is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed.

Plaintiffs also seize upon the words "alter" and "revolution" and argue that their inclusion in the statute must mean that public employees may not engage in conduct or association which seeks, by peaceful and lawful means, to effect a radical change in the governmental structure. To find such a legislative intent in the statute would be unreasonable in view of the provisions in both state and federal constitutions for amendments to our constitutional form of government. It is not difficult to ascribe a strained interpretation to a statute if one is dissecting it with a view to the establishment of its invalidity, but sound principles of statutory construction require that the provisions of a statute be interpreted in a manner consistent with the intent and purpose of the entire enactment and the usual meaning of the language in the context in which it is employed. In context, it is clear that "revolution" as used does not refer to a peaceful change of a revolutionary nature. It is to be construed along with the accompanying

words "by . . . force or violence" and refers to forceful or violent revolution,[24] which has been the usual historical meaning of the word "revolution" when used in a political context. As so construed, the inclusion of the word "revolution" is admittedly redundant, but the fact of such redundancy will not sustain an argument that the legislature intended by the mere insertion of that word to fundamentally enlarge and change the whole scope and intent of the enactment in disregard of the established concepts of constitutional amendment or change by peaceful and lawful means. To state such an interpretation is to reveal its absurdity.

Similarly, the words "force or violence" as used in the statute clearly modify and relate back to the antecedent verb and noun, "alter" and "alteration," just as they modify the other verbs and nouns in the series of which they are a part; viz:

> "any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction, or alteration of . . . the constitutional form of the government . . . by . . . force or violence."

It has not been shown that upon subscribing to the "disclaimer" oath plaintiffs will thereby experience any stifling of their freedom of inquiry, criticism and dissent, nor that their academic freedom will be impaired. Without questioning the sincerity of plaintiffs' fears that public

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24. See *Shub v. Simpson*, 196 Md. 177, 76 A.(2d) 332, certiorari denied 340 U.S. 861, in which the Maryland court so construed a statute couched in terms substantially similar to those employed in Chapter 377, Laws of Washington, 1955; and

Gerende v. Board of Supervisors, 341 U.S. 56, in which the United States Supreme Court affirmed *per curiam* a Maryland decision based on the interpretation of the statute as given in *Shub*.

hysteria or the temper of the times might conceivably at some future time bring about such a result we are unable in this declaratory judgment action to find any substantiation for such fears, on the face of the statute, or in the facts of record or within judicial knowledge. It is our conclusion that Chapter 377, Laws of Washington, 1955, does not constitute a prior restraint on First Amendment freedoms; nor are we constrained to find its language to be vague and uncertain.

As to alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination,[28] or lack of frankness and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point.

A further argument made against the validity of the

25. 367 U.S. 203.
26. 367 U.S. 290.
27. *Lerner v. Casey*, 357 U.S. 468.
28. *Nelson v. Los Angeles County*, 362 U.S. 1.
29. *Beilen v. Board of Education*, 357 U.S. 399.

loyalty oath statute is that it infringes upon the privilege against self-incrimination. There is no merit in this argument. The statutory requirement that government employees must answer relevant questions by written statement if they wish to establish their eligibility for employment does not require plaintiffs to give testimony against themselves. The absence of any inquiry into past conduct and the implied inclusion of the element of scienter negate the potential danger of self-incrimination. The statements in *Cramp, supra,* on which plaintiffs rely, were made in reference to an oath in language found to be unconstitutionally vague and are not applicable here.

Relying primarily on *Speiser v. Randall,*[30] plaintiffs further argue that the loyalty oath requirement is an unconstitutional shifting of the burden of proof in regard to the loyalty of a government employee. However, in *Konigsberg v. State Bar Association,*[31] the United States Supreme Court pointed out that there is a distinction between statutes penalizing or controlling free speech—like the statute found unconstitutional in *Speiser*—and those statutes "merely denying access to positions where unfitness may lead to abuse of state-given powers or privileges."[32] In *Speiser,* the court distinguished such cases as *Garner v. Board of Public Works,* 341 U.S. 716, *Gerende v. Board of Supervisors,* 341 U. S. 56, and *American Communications Assn. v. Douds,* 339 U. S. 382, in that the purpose of the statutes there involved was to protect "some interest clearly within the sphere of governmental con-

30. 357 U.S. 513.
31. 366 U.S. 36.
32. *Id.* at page 52.

cern" from an evil "sufficiently grave to justify limited infringement of political rights."[33] We think the statute here involved, insofar as it affects these plaintiffs, is similarly distinguishable. *Speiser* is therefore not controlling.

The pre-emption argument based on *Pennsylvania v. Nelson*,[34] need not detain us long, on these facts. The court's opinion in *Uphaus v. Wyman*,[35] indicates that *Nelson* did not strip the states of the right to guard their own security and a state may legitimately make inquiry and investigate in this area.

The contention that the loyalty oath statute is a bill of attainder was argued and disposed of in the course of the prior litigation and merits no discussion here. See also *Garner v. Board of Public Works, supra*, at page 722.

As in the prior litigation arising out of this statute, the question whether or not an employee who refuses to subscribe to the loyalty oath will be afforded a hearing prior to discharge presents a substantial issue of due process. The Supreme Court of the State of Washington has held in *Nostrand v. Little*[36] that professors with tenure are entitled to a hearing under the terms of their employment contract and the rules and regulations under which the University of Washington is operated. The rights of state employees other than tenured professors were not before the Washington court in *Nostrand* and the court did not feel obliged to reach the question of the hearing rights of employees other than the plaintiffs there.[37]

33. *Speiser v. Randall*, 357 U.S. 513, 527.
34. 350 U.S. 497.
35. 360 U.S. 72.
36. 58 W.(2d) 111.
37. *Nostrand v. Little*, 58 Wn.(2d) 111, footnote 6 at page 133.

Whether or not the non-tenured employees of the University—some of whom are plaintiffs here—have a right to a hearing under any statutory provisions is unclear. Defendants have argued that such employees may be entitled to a hearing under the provisions of the Administrative Procedure Act[38] or under the State Civil Service Law.[39] Plaintiffs, on the other hand, have argued that neither the Administrative Procedure Act, as construed in *Nostrand v. Little, supra,* nor the civil service statute are applicable to employees of the University, which is operated under rules and regulations adopted by the Board of Regents pursuant to statutory authority.[40]

Plaintiffs interpret the statutory language: "refusal to answer on any grounds shall be cause for immediate termination of . . . employment"[41] to mean that upon the refusal of an employee to sign the oath, for no matter what reasons, discharge will follow automatically and immediately, without any opportunity for the employee to explain or defend his refusal to sign. Plaintiffs' reading of the directive issued from the office of the President of the University requiring compliance with the statutory oath provisions leads plaintiffs to the conclusion that university officials similarly interpret the statute as requiring *automatic* and summary discharge for every refusal to sign regardless of the basis of the refusal. The statutory language does not compel such a conclusion and we are not persuaded that it is so interpreted by the University administration, nor that the statute will be so

38. Chapter 234, Laws of Washington, 1959; RCW 34.04.010 *et seq.*
39. Chapter 1, Laws of Washington, 1961; Chapter 41.06, RCW.
40. RCW 28.77.120 and RCW 28.77.130.
41. RCW 9.81.070.

administered by them. The fact that refusal on any ground is declared to be "cause" for immediate termination of employment does not close the door to hearing and inquiry; nor does it preclude the exercise of administrative discretion if it should appear that the refusal to sign the oath is in no way related to a wilful refusal to make disclosure as to whether or not the employee is a member of a subversive organization.

In connection with the "automatic discharge" issue, defendants have cited the case of *Nelson v. Los Angeles County*,[42] which involved discharges of two county employees—one permanent, one temporary—after they refused to answer inquiries of an investigating committee relating to subversive activities. The case is not helpful inasmuch as the employees in *Nelson* were discharged for "insubordination." Furthermore, affirmance of the discharge of the permanent employee was by an equally divided court which renders the case of little value as a precedent.[43]

Plaintiffs, in turn, rely on *Slochower v. Board of Education*,[44] in which a statute providing for discharge of city employees who invoke the Fifth Amendment was held to be arbitrary and unreasonable because based on a "built-in" inference of guilt from the invoking of the constitutional privilege.

Although discharge of a state employee for failing to fulfill a condition of employment by signing the loyalty

42. 362 U.S. 1.

43. *United States v. Pink*, 315 U.S. 203, 216; *Hertz v. Woodman*, 218 U.S. 205, 213-214.

44. 350 U.S. 551.

oath carries no necessary inference of disloyalty of the employee, it would be ostrich-like to ignore the practical realities of a public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status. The severe impact of such a discharge upon an employee whose refusal may be motivated by considerations unrelated to disloyalty invokes the protection of due process with compelling force.

The United States Supreme Court, in referring to language used in *Adler v. Board of Education*[45] and *United Public Workers v. Mitchell*,[46] has said, through Justice Clark:

> "To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

This principle expressed in *Wieman v. Updegraff*[47] was recently reaffirmed in *Cramp v. Board of Public Instruction*.[48]

It has not been urged here by defendants that plaintiffs are not entitled to such constitutional protection. On the contrary, defendants in their brief have urged this

45. 342 U.S. 485.
46. 330 U.S. 75.
47. 344 U.S. 183, 192-2.
48. 368 U.S. 278, 288.

court not to assume that non-tenured employees are not entitled to a hearing under some aspect of Washington law. As was pointed out earlier in this opinion, in this declaratory judgment proceeding the dismissal policies and hearing procedures which would actually be put into effect by the University administration under the statute and/or under its own rules and regulations are a matter for speculation. On the showing here made this court will not presume that the defendant state officials will act arbitrarily or in disregard of constitutional rights of public employees, but this court must assume that the statute will be administered and applied in a constitutional manner.[49]

Finding no invalidity of Chapter 377, Laws of 1955, either on its face or in the light of the facts of record, we pass on to a consideration of the oath of allegiance provisions of Chapter 103, Laws of 1931.

The Oath of Allegiance Statute

In the codification of Chapter 103, Laws of 1931 (RCW 28.70.150 and RCW 28.76.230), certain changes have been made in the language of some sections thereof. For this reason the entire chapter is set out in the footnotes for reference.[50] The statutorily-prescribed language of the

49. *Cf. Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372, 384, affirmed *per curiam* 358 U.S. 101.

50. Chapter 103, Laws of Washington, 1931:

"Section 1. That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:

"'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'

"No license to teach in the State of Washington shall be issued, or contract,

oath of allegiance is found in Section 1 of Chapter 103, which reads:

> "That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:
>
> "'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'
>
> "No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation."

In view of the mandatory language of the statute there

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or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation.

"Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, or is entirely or in part exempt from taxation, shall before entering upon the discharge of his or her duties subscribe to the oath or affirmation prescribed in Section 1 before a person authorized by law to administer oaths and/or affirmations, such oath or affirmation to be executed in duplicate and one copy filed with the head of such institution and the other retained by such deponent.

"Sec. 3. The clerks of school boards are hereby authorized to administer the oath required by this act.

"Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided, and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void.

"Sec. 5. If any section of this act shall for any reason be held invalid, that such construction shall not affect the other provisions herein contained not expressly invalidated.

"Sec. 6. The oath herein provided shall be required of all teachers whose contracts are renewed or executed from and after March 1, 1931.

"Passed the Senate March 4, 1931.

"Passed the House March 10, 1931.

"Approved by the Governor March 20, 1931."

can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath.

Insofar as the arguments heretofore considered with respect to the loyalty oath are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable. Additional arguments particularly addressed to the oath of allegiance relate to alleged vagueness of the language employed in the statutory form of oath; alleged infringement of religious liberty; and alleged interference with foreign relations, by, in effect, excluding foreign scholars from teaching positions at the University of Washington.

With regard to the latter argument we entertain doubts that the Washington legislature had in contemplation the application of the oath requirement to aliens, or that the enactment consciously expressed any legislative intent to exclude foreign citizens from teaching positions in the State of Washington. In actuality, the oath prescribed by the 1931 statute has not been required of alien members of the teaching faculty at the University of Washington, but they have been permitted to modify the statutory language to reflect a limitation of the undertaking to that which is compatible with citizenship in another sovereign nation. It has been stipulated that it is the intention of the University administration to continue this policy.[51] In practice, foreign scholars are not excluded from teaching at the University of Washington nor is a condition imposed on them which is unreasonably inconsistent with

51. Pretrial Order, page 77.

their own national allegiance. On these facts, neither the impact of the 1931 statute on aliens nor any speculative effect of its enforcement on the pre-empted field of foreign relations, are properly before this court. The alien plaintiffs may not challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced.[52]

Plaintiffs raise issues in regard to alleged vagueness of the language of the prescribed oath of allegiance. In particular, they find uncertainty in the meaning and scope of the words, "institutions", "reverence for law and order", and "undivided allegiance to the government . . ." Certain plaintiffs who are Quakers are alarmed by what to them is the import of the phrase "undivided allegiance to the government . . .", which they construe to exclude the possibility of allegiance to God, humanity, individual conscience, or the concept of world government. In plaintiffs' brief it is argued that the statute seeks to establish an official religion of secular nationalism and thereby infringes on religious freedoms guaranteed by the First Amendment to the United States Constitution.

Plaintiffs further state they do not know what positive changes in their subject-matter teaching may be expected of them if they swear to "promote" by "precept" and "example" the qualities enumerated in the statute.

These contentions of vagueness of the oath of allegiance statute raise substantial constitutional issues, bringing into question as they do the meaning and intended scope of the statute. Although statutory construction may resolve

52. Cf. *Poe v. Ullman*, 367 U.S. 497.

these questions in such a way as to remove doubts concerning constitutionality, it appears that the Supreme Court of Washington has never had occasion to construe the oath of allegiance provisions of Chapter 103, Laws of 1931, although declaratory judgment proceedings are available in the Washington courts. Authoritative interpretation of the statute by the Washington court may avoid the constitutional issue, or show it in clearer perspective, or resolve it. The following statements from Justice Stone's opinion in *Federation of Labor v. McAdory*[53] seem particularly applicable to the present case:

> "In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. *Spector Motor Co. v. McLaughlin, supra,* 105; see also *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 543; *Huddleston v. Dwyer*, 322 U. S. 232. Such is not the function of the declaratory judgment.
>
> ". . . it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states for forestalling state action in construing and applying its own statutes. See *Great Lakes Co. v. Huffman, supra,* 300, et seq."

The granting or withholding of equitable or declaratory relief in federal court suits which seek to limit or control

53. 325 U.S. 450, 470-1

state action is committed to the sound discretion of the court.[54] Accordingly, in the absence of a concrete factual showing that any plaintiff or any member of the classes of state employees here represented has suffered actual injury by reason of the application of the oath of allegiance statute (Chapter 103, Laws of 1931) this court will decline to render a declaratory judgment as to the constitutionality of that statute in advance of an authoritative construction by the Washington Supreme Court.

Having found no invalidity of Chapter 377, Laws of 1955, and having declined to consider the constitutionality of Chapter 103, Laws of 1931 in advance of state court interpretation, we deny plaintiffs' request for a permanent injunction against the enforcement of these statutes, and the preliminary injunction now in effect will be dissolved.

Counsel are directed to file with the clerk of the court within ten days from the date of this opinion an order in accordance with the conclusions herein stated.

DATED February 9, 1963.

GILBERT H. JERTBERG

United States Circuit Judge

WILLIAM J. LINDBERG

United States District Judge

W. T. BEEKS

United States District Judge

54. *Federation of Labor v. McAdory*, 325 U.S. 450; *Great Lakes Co. v. Huffman*, 319 U.S. 293; *Railroad Comm. v. Pullman Co.*, 312 U.S. 496; *Burford v. Sun Oil Co.*, 319 U.S. 315.

JUDGMENT AND FINAL ORDER

United States District Court
Western District of Washington
Northern Division

LAWRENCE W. BAGGETT, et al.,
Plaintiffs,

v.

DOROTHY BULLITT, et al.,
Defendants.

No. 5598

This class action asking the court to declare unconstitutional Chapter 377, Laws of 1955 of the State of Washington and Chapter 103, Laws of 1931 of the State of Washington, and seeking the issuance of a permanent injunction against the enforcement thereof, having come on regularly for hearing before this three-judge district court convened pursuant to the mandate of 28 U.S.C. §§ 2281 and 2284, and the court having studied the pretrial order and the briefs filed herein, having heard arguments of counsel, and having heretofore filed a memorandum opinion, and being fully advised; now, therefore, the court enters its final judgment as follows:

IT IS ADJUDGED that Chapter 377, Laws of 1955 of the State of Washington does not violate Article 1, Section 10, the First Amendment, the Fifth Amendment, or the Fourteenth Amendment of the Constitution of the United States; the subject-matter covered by said statute has not been preempted by Congress; and said statute is not unconstitutional.

IT IS ADJUDGED that no declaratory judgment as to the constitutionality of Chapter 103, Laws of 1931 of the State

of Washington, will be rendered by this court in advance of an authoritative interpretation of said statute by the Supreme Court of the State of Washington.

IT IS ORDERED that the application for a permanent injunction against the enforcement of the above-mentioned statutes be and it hereby is denied, and the complaint be and it hereby is dismissed with prejudice, and defendants are awarded their costs herein.

IT IS FURTHER ORDERED that the preliminary injunction now in effect herein be and it hereby is dissolved, subject, however, to any stay of the enforcement of this judgment which may be entered by this court pending an appeal to the Supreme Court of the United States.

DATED this 25th day of February, 1963.

GILBERT N. JERTBERG
United States Circuit Judge

WILLIAM J. LINDBERG
United States District Judge

W. T. BEEKS
United States District Judge

APPENDIX B
STATUTES AND OATHS INVOLVED

I.

THE 1931 ENACTMENT: Chapter 103, Laws of Washington, 1931:

"Section 1. That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:

"'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'

"No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation.

"Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, or is entirely or in part exempt from taxation, shall before entering upon the discharge of his or her duties subscribe to the oath or affirmation prescribed in section 1 before

a person authorized by law to administer oaths and/or affirmations, such oath or affirmation to be executed in duplicate and one copy filed with the head of such institution and the other retained by such deponent.

"Sec. 3. The clerks of school boards are hereby authorized to administer the oath required by this act.

"Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided, and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void.

"Sec. 5. If any section of this act shall for any reason be held invalid, that such construction shall not affect the other provisions herein contained not expressly invalidated.

"Sec. 6. The oath herein provided shall be required of all teachers whose contracts are renewed or executed from and after March 1, 1931.

"Passed the Senate March 4, 1931.

"Passed the House March 10, 1931.

"Approved by the Governor March 20, 1931."

II.

THE 1955 ENACTMENT: Chapter 377, Laws of Washington, 1955, Amending Chapter 254, Laws of Washington, 1951 (The Subversive Activities Act):

A. Chapter 254, Laws of Washington, 1951 (RCW 9.81 *et seq.) Definitions for Purposes of the Oath:*

Subversive Person Ineligible for Public Employment:

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5))

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction or alteration of; the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010 (2))

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3))

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083)

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

B. By Chapter 377, Laws of 1955, the 1951 enactment was amended by adding two new sections and amending Sec. 12 (RCW 9.81.010):

"SECTION 1. Section 12, Chapter 254, Laws of 1951, and RCW 9.81.070 are each amended to read as follows:

"Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such person, board, commission, council, department, court, or other agency shall*

require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (Amendatory language emphasized) (RCW 9.81 .070).

"SEC. 2. Section 13, Chapter 254, Laws of 1951, and RCW 9.81.080 are amended to read as follows:

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof.

"SEC. 3. *For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No.* 9835. (Held unconstitutional by the Washington Court).

"SEC. 4. *The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder.*" (RCW 9.81.083).

III

OATH FORMS A AND B

Oath Form A

STATE OF WASHINGTON

Statement and Oath for Teaching Faculty of the University of Washington

I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

I further certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....

(Signature)

.....

(Title and Department)

Subscribed and sworn (or affirmed) to before me this .....day of ....., 19....

.....

Notary Public in and for the State of Washington, residing at.....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed," respectively.

Oath Form B

STATE OF WASHINGTON

Statement and Oath for Staff of the University of Washington Other Than Teaching Faculty

I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member

of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....

(Signature)

.....

(Title and Department or Office)

Subscribed and sworn (or affirmed) to before me this .....day of ....., 19.....

.....

Notary Public in and for the State of Washington, residing at.....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed," respectively.

APPENDIX C

Relevant Minutes of the Meeting of the Board of Regents, University of Washington, May 25, 1962:

MINUTES
MEETING OF BOARD OF REGENTS
UNIVERSITY OF WASHINGTON
May 25, 1962

The Board of Regents met in executive session beginning at 9:30 a.m., Friday, May 25, 1962, in the Regents' Room on the University of Washington campus. The open meeting began at 3:00 p.m.

Present were Regents Bullitt, Drumheller, King, Little, Murphy, Shefelman, and Willis: President Odegaard and Secretary Hoagland. Also present were Mr. Conrad, Mr. Harlocker, Mr. Look, Dr. Schram, Dr. Thieme, and Mr. Wageman. Mr. Little was present for most of the morning session and was excused from the afternoon session because of his commitments relating to Secretary Dean Rusk's visit to Seattle.

Due regular and usual notice of this meeting had been given to the press, radio, television, and the public by Mr. Irwin S. Blumenfeld as appears from his affidavit in the files of the Secretary's office.

MINUTES OF THE PREVIOUS MEETING

The minutes of the April 27, 1962 meeting were approved as circulated to the members of the Board in advance of this meeting.

ACADEMIC AFFAIRS

• • •

LOYALTY OATH AND OATH OF ALLEGIANCE

President Odegaard reported to the Board that the University had been advised by the Office of the Attorney General of the State of Washington that pursuant to the decision of the Supreme Court of the United States there had been dissolved the restraining order which had the effect of suspending the requirements as provided by state law that all employees should sign the loyalty oath and that the teaching faculty should sign in addition the oath to support the constitution.

He stated that like every other board, commission, council, department, court or other agency of the State of Washington, the Board of Regents is required by state law to use procedures designed to ascertain whether a person employed by it is a subversive person and to require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization. The Office of the Attorney General has provided an approved form of statement and oath to carry out the statutory requirements.

It was noted that the law further provides that "refusal to answer on any grounds shall be cause for immediate termination" of employment. To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, President Odegaard stated that he will request a check of the personnel records of the University so that

those persons who have not previously sworn to the required oaths may be requested to do so. They will receive letters of request as soon as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, he recommended that compliance be requested by October 1, 1962, with notification that employment will be terminated 30 days later, as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign.

Upon the recommendation of the Educational Policy Committee the Board of Regents approved the schedule recommended by the President of the University and in addition adopted the following statement:

If any member of the faculty having tenure should fail to comply with the state requirements, be given notice of termination of employment, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with a provision of Washington state law which is binding upon the Board of Regents.

Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:

> "The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.
>
> "They furthermore accept in principle the concept that the privilege of a faculty member to hold his

position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the State of Washington."

In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath.

FINANCE COMMITTEE

* * *

CERTIFICATE OF SERVICE

We hereby personally certify that ~~a copy~~ three copies of the above and foregoing Statement of Appellants ~~was~~ were personally served upon the Attorney General of the State of Washington, Counsel of Record for Appellees, by personally delivering a copy to him, on or before June 12, 1963, at the Seattle office of Washington's Attorney General: 216 Norton Building, Seattle, Washington, the office of record for counsel for appellees in this case.

Arval A. Morris

Arval A. Morris

Kenneth A. MacDonald

Kenneth A. MacDonald

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1962

No. 2201

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ALBERT MURPHY, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Appellees.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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STATE PRINTING PLANT, OLYMPIA, WASH.

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IN THE

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UNITED STATES

OCTOBER TERM, 1962

No. .....

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Appellees.

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Pursuant to the provisions of Supreme Court Rule 16 (1), appellees respectfully move the above entitled court to dismiss this appeal, or in the alternative to affirm on the grounds that the appeal presents no substantial federal question.

The appellants shall be referred to in this brief as "the employees" and the appellees as "the regents."

The jurisdictional statement shall be referred to as "statement."

This Court should be advised that E. A. Addington appears as an appellee in the caption of the statement in place of Albert Murphy. Mr. Addington has, in fact, filled the vacancy on the Board of Regents caused by Albert Murphy's death. However, to our knowledge, no motion has been made changing the parties.

Part I

ADDITIONS AND CORRECTIONS TO EMPLOYEES' STATEMENT OF THE CASE

Employees' Statement of the Case (Statement, p. 11) contains so much material that is argumentative, omits so much and, in fact, contains so much erroneous information that Regents, at the outset, must correct it and add to it.

Because this litigation has a long history, is of a declaratory nature, and because the key statute

involved is amendatory in nature, we have included certain appendices. Appendix A sets out much of the legislation passed since World War II relating to subversive activities. Appendix B sets out the oath forms, or the statutes on which the oaths are based, involved in the leading cases to come before this Court.

LEGISLATIVE BACKGROUND

For these same reasons, it is necessary to consider chronologically the statutes and the litigation involving subversive activities since World War II. Chapter 377, Laws of 1955 cannot be viewed in a vacuum. It is amendatory and it is only one of a number of acts passed over a period of years since World War II. It is necessary to examine these other acts as well and to consider their legislative background. (See *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, at p. 465 *et seq.*) (The statute requiring an oath of allegiance, chapter 103, Laws of 1931, will be considered in Part VII, *infra.*)

In 1947 the legislature passed the first of these measures. (Laws of 1947, chapter 287, section 2, p. 1334.) It was a proviso in the appropriation act forbidding public funds from reaching public employees who advocated, or who were members of organizations which advocated, the overthrow of the government of the United States by force or violence. During the same session, the legislature through House Concurrent Resolution No. 10 cre-

ated a joint fact-finding committee on un-American activities. (Laws of 1947, p. 1378, set out in Appendix A, *infra.*) A petitioner asked this court to review this resolution. *State ex rel. Robinson v. Fluent*, 30 Wn. (2d) 194, 191 P. (2d) 241, 335 U. S. 844 (Cert. den.). This committee held extensive hearings, involving a great many witnesses. Litigation resulted from these hearings. *State v. James*, 36 Wn. (2d) 882, 221 P. (2d) 482, 341 U. S. 911 (Cert. den.), 341 U. S. 937 (rehearing den.), *State v. Gundlach*, *State v. Forschmiedt*, *State v. Ottenheimer*, *State v. James*, 36 Wn. (2d) 918, 221 P. (2d) 502; 341 U. S. 910 (cert. den. in *Forschmiedt & James*); 341 U. S. 937 (rehearing den.).

The committee reported its extensive findings and recommendations to the 1949 session of the legislature. (House Journal 1949, p. 1095.) This was not included in the appendices because of its length. On page 1095, the committee incorporated by reference two lengthy printed reports containing a stenographic transcript of the hearings, the *First Report Un-American Activities in Washington State, 1948*, and *The Second Report, Un-American Activities in Washington State, 1948*. The *First Report* and *Second Report* are a part of the record in this case.

In 1949 the legislature enacted a proviso, as part of its appropriation act, similar to that adopted by the legislature in 1947. This is set forth in Appendix A, *infra*. During that session four separate

bills were introduced to continue this committee (House Bill No. 264, Senate Bills 361, 378 and 356, this last by title only). Not one became law.

In 1951 the Governor in his message to the legislature urged the legislature to "give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hand of our enemies." He further pointed out that,

> "By Concurrent Resolution No. 10, the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. Therefore a bill is being prepared calculated to give support at the state level to the efforts of our various federal agencies charged with the responsibility of combatting these forces of tyranny and enslavement. * * *" (*House Journal 1951*, beginning at p. 23).

A bill was introduced by executive request which later became chapter 254, Laws of 1951. This act is very similar to Maryland's Ober Act. (Chapter 86, Laws of Md. 1949, Anno. Code of Md., Article 85A.) It is set out in full in Appendix A, *infra*. Five of the original twenty-two sections, namely, sections

6, 7, 8, 10 and 21 were vetoed. The Court will note that it is a broad act relating to many matters in addition to public employees. Section 16 of this act, which requires an oath as a condition precedent to filing a declaration of candidacy for public office, was unsuccessfully challenged in *Huntamer v. Coe*, 40 Wn. (2d) 767, 246 P. (2d) 489.

In 1953, after this Court's decision in *Wieman v. Updegraff*, 344 U. S. 183, the legislature passed chapter 142, Laws of 1953, amending the definition of "subversive person," to make the element of scienter more clear. This is set out in full in Appendix A, *infra*.

In 1955, the Governor, in his message to the legislature, pointed out that "* * * the menace of communism looms as an ever greater threat to the future of the free world than the 'isms' of the past. The United States is giving, and must continue to give, leadership to the non-communist world. To do so, with ever increasing confidence and vigor, our nation must lead from strength, the strength from within that comes from a free people, spiritually strong and functioning through the soundest set of governmental institutions yet developed by man. * * *" (*Senate Journal*, 1955, p. 34.) During this session chapter 377, Laws of 1955, one of the acts in question, was passed. (See Statement, Appendix B, p. 37.)

In the years since World War II, the legislature, responding to world conditions, has passed several

measures relating to subversive activities. The approach has been pragmatic. It began with a proviso in the budget, followed by a fact-finding committee which was discontinued two years later. After the Korean conflict began a comprehensive act was passed, which in turn has been twice amended. The pattern was formed over many years based upon experience. No such legislation has been passed in the last eight years. It is not "scare legislation" passed in a moment of hysteria. There is no permanent fact-finding committee. (There has been no such committee for almost a decade and a half.) It is not perfect. It is controversial. Many doubt its wisdom. But we shall endeavor to show that it violates no constitutional provision and that the route is open to legislative action. The wisdom of the statute is, of course, a matter for the legislature, not the courts. See *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, at p. 224.

THE OATH

The 1955 statute does not prescribe any particular oath forms. The state attorney general has provided a suggested form to the state printer. This suggested oath form has been revised at least twice by the state attorney general. The state printer in turn supplies the oath forms to various agencies. Some large agencies print their own oath forms, other agencies combine the oath form with an application form. Oaths are kept on file with the em-

ploying agency. We are unaware of any discharge based on refusal to sign the oath.

The suggested oath is usually called a "loyalty oath." It is unfortunate that this term with its many-layered connotations should denote this oath. While we have used this terminology on occasion ourselves because of its widespread currency, this should not obscure the fact that the oath is not a loyalty oath at all but is in fact a negative disclaimer oath. (It is suggested that this court examine oath form B (Statement, Appendix, p. 40) rather than oath form A which is confusing in that it also contains the oath required by the 1931 act.)

A person taking the oath swears to two facts: that he is not a subversive person as defined in the Act, and that he is not a member of the Communist Party or knowingly of any other subversive organization. Only the second fact is required by the 1955 Act. The former stems from sections 11 and 12 of the 1951 Act.

Employees blur this distinction and lump the entire oath into the 1955 Act. Thus on p. 23 of their statement, they state that "Oath form B * * * carries an oath designed solely to satisfy the requirements of the 1955 statute." (Emphasis supplied.)

Section 13 of the 1951 Act concerns non-sensitive positions. No claim is made by employees that the positions involved in this case are, or should be, non-sensitive.

The oath requirement contemplated by section 1 of the 1955 Act looks to the present. Thus, it is possible for a communist to resign from the Communist Party today and take the oath tomorrow. Unlike other oath requirements before this court (See Appendix B where several of these oath forms have been set out), past membership is not involved.

The oath so clearly satisfies the scienter requirement as a result of statutory amendment (chapter 142, Laws of 1953), judicial interpretation (*Nostrand v. Balmer, supra*, at p. 460, 470, 476 and 484) which this court must "accept without question" *Cramp v. Florida*, 368 U. S. 278, and the form of the oath itself, that Employees have made no claim that scienter is lacking. *Wieman v. Updegraff*, 344 U. S. 183 is, as a result, not applicable.

The oath requirement is pinpointed to a particular group: Officials and employees of state and local government. No attempt was made to cover a person without regard to his employment as in *Speiser v. Randall*, 357 U. S. 513.

Prior Litigation

The 1955 Act was unsuccessfully attacked in 1955 by two University of Washington professors. They prevailed in the State Superior Court, but the federal constitutional questions which they raised in that case were decided adversely to them by the Washington State Supreme Court. *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10. The plaintiffs there, who were professors with tenure at the

university, appealed to this Court. This Court vacated the decision of the State Supreme Court and remanded the case for consideration of the question of whether state employees required to sign such an oath are entitled to a hearing at which refusal to take the oath could be explained or defended. *Nostrand v. Little*, 362 U. S. 474. Pursuant to this remand, the Washington Supreme Court answered the question in the affirmative. *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551. As to all other issues involved in the case, the State Supreme Court adhered to the views expressed in its earlier opinion.

An appeal was again taken to this Court. On January 22, 1962, this Court granted the State Attorney General's motion to dismiss. This Court dismissed the appeal "for want of a substantial federal question." *Nostrand v. Little*, 368 U. S. 436.

The great bulk of the Employees' "substantial" questions relating to the 1955 Act is thus being served up to this Court for the third time. Included in this group are the First and Fifth Amendment arguments. All of this litigation has been declaratory in nature. No one, to our knowledge, has refused to sign in the sense that discharge proceedings could be started against the one refusing. No one, to our knowledge, has been discharged for not signing. Seldom has there been so much litigation over so few concrete facts.

THE REFUSAL TO SIGN

Stripped of biographical data, statements of intention, background on the University of Washington, and other matter of less relevance, the operative facts are few in number. The University has proffered the oaths and gave the recipients until October 1, 1962 to sign them. Prior to October 1, 1962 the lower court enjoined the University from demanding the completion of the oaths, this injunction being presently in force. Hence, as the lower court noted, "Enforcement of the statutes by University officials, while clearly intended, is still prospective as a result of this litigation." (Statement, p. 9, Appendix.) Thus, there is nothing preventing all of the Employees from changing their mind today and deciding to take the oath, despite their vehement statements of intention. (See P.T.O. p. 99.) Thus, the word "refusal" when it occurs in the pre-trial order and in the lower court opinion must be seen in the light of a threat, avowal, or statement of intention, subject to change at any moment, not as an actual irrevocable refusal. This being true, the "refusal" of the Employees is not an operative fact except, perhaps, in a Pickwickian sense. In other words, the demand for information is a certainty (and the First Amendment argument should be seen in this light) and the continued refusal and possible discharge with or without a hearing is only a possibility (and the Fourteenth Amendment argument should be seen in this light). The question of whether there is an actual controversy is considered in Part VIII, *infra*.

Part II

THE 1951 ACT, AND THE PORTION OF THE OATH BASED THEREON, ARE NOT PROPERLY BEFORE THIS COURT

We assume that only the 1931 Act and the 1955 Amendatory Act are being challenged. There is some confusion in Employees' Statement, in this regard. On page 79 they may be referring to the 1951 Act. On page 11 they refer to "several statutes" but on page 4 and page 81 they refer unequivocally to the 1931 Act and the 1955 Act. This confusion sometimes takes the form of an erroneous statement as on p. 13 where we learn that the 1955 Act "sets forth a requirement in addition to those imposed by the 1951 Subversive Activities Act: that the official heads of each state agency * * * shall require that each and every employee, or applicant for employment shall state under oath whether or not he or she knowingly * * * is a subversive person * * *:" In fact, this provision existed for years prior to the passage of the 1955 Act in the form of Section 12 of the 1951 Act. On page 15 we learn that RCW 9.81.083 is part of the 1951 Act while in fact it is part of the 1955 Act. On page 88 reference is made to 9.91.060 which relates to leaving children unattended in a parked automobile.

While the last few errors are admittedly technical in nature, much of the confusion as to the

statutes involved, being endemic in the Statement, is not so simply segregated.

Another aspect of this confusion is presented by the Employees' treatment of criminal sanctions.

One is protected against the imposition of a criminal sanction by a panoply of constitutional guarantees which are not applicable to the imposition of a civil disability such as loss of public employment. This is true even though the latter may, on occasion, be more drastic than the former.

Quite apart from the crime of perjury, the 1951 statute contains certain criminal provisions based on knowing membership in a subversive organization which, to be candid, would pose constitutional questions if they were before this Court, in view of *Noto v. U. S.*, 367 U. S. 290 and *Scales v. U. S.*, 367 U. S. 203. Employees have made frequent reference to them as if they had somehow attainted the statutory provisions in question. (See Statement, pp. 13, 16, and p. 54 where Employees cite the criminal cases of *Scales*, *Noto*, both *supra*, *Yates v. U. S.*, 354 U. S. 298, and *Dennis v. U. S.*, 341 U. S. 494, as authority for the proposition that a civil disability may not be imposed. See also pp. 47-49 where the criminal sanction is blended with the civil sanction. The question is not whether a state has "any power to prevent" something. The question is whether a civil disability can be imposed in certain situations.

In addition to creating confusion, Employees' failure to challenge the 1951 Act directly creates

two serious questions. First, can this Court on this record invalidate the 1951 Act? Second, assuming that the Court cannot, how would invalidation of the 1955 Act affect the 1951 Act?

We submit that the Court cannot invalidate the 1951 Act. Employees have challenged an administrative measure, namely, the oath as formulated, without challenging the statute upon which the administrative action is based. While this type of challenge is common enough where the administrator has exceeded the bounds of his authority, and is not acting within the scope of his statutory authority, it is surely a rarity where, as here, no claim is made that the action of the administrator is without statutory foundation. To the contrary, they have, by way of argument, attempted to challenge the definitional provisions of the 1951 Act (Statement, p. 100.) It would be a bizarre decision which struck down an administrative measure clearly based upon an unchallenged statute; it would be an even more bizarre decision which invalidated a statute not before the court on the basis of an administrative act. A portion of the oath is so directly bound to the 1951 Act, as pointed out earlier, that to challenge this portion of the oath, the Employees must challenge the 1951 Act. This they have not done. This they cannot do for two reasons.

In the first place, Employees did not challenge the 1951 Act in the lower court and may not do so for the first time on appeal. *Shelley v. Kraemer*, 334

U. S. 1. In addition, Employees have not directly challenged the 1951 Act in their appeal to this Court. The question is thus not raised. *U. S. v. Spector*, 343 U. S. 169. The question, at best, lurks in the record, and this is not sufficient. *McNeal v. Culver*, 365 U. S. 190. This Court is rightly reluctant to pass upon constitutional issues which are not squarely presented by the record. *Arkansas Fuel Oil Co. v. La. ex rel. Muslow*, 304 U. S. 197.

The other question to be considered is, how would invalidation of the 1955 Act affect the 1951 Act?

The general rule, supported by Washington cases is: if the amendatory act is wholly invalid, the statute sought to be amended is held to remain in full force and effect. 1 Sutherland, Statutory Construction, 442, § 1937, 3rd ed. 1943. See *North Bend Stage Line v. Dept. Public Works*, 170 Wash. 217, 16 P. (2d) 206, where the state high court said at page 220:

> " * * * These sections, as unamended, provide for review of orders of the department in the superior court substantially as, by these amendments, they provide for such review in this court. * * * "

And at page 228 after holding the grant of direct appeal from the department to the state supreme court unconstitutional, the court said that the amended statutes " * * * remain unsuperseded and unrepealed by chapter 119, Laws of 1931, p. 363

* * * " citing *Corwin Investment Co. v. White*, 166 Wash. 195, 6 P. (2d) 607.

Indeed, in the previous oath case of *Nostrand v. Balmer, supra*, the Employees admitted as much when on page 85 of their brief to the state high court they unequivocally stated that, "To declare the entire 1955 Act unconstitutional is to leave the 1951 Act totally effective and to eliminate the problems of interpretation."

Viewed in this light, the Employees' references to the 1951 Act and to the portion of the oath derived from the 1951 Act seem indeed wide of the mark.

Part III

THE 1955 ACT DOES NOT VIOLATE THE FIRST AMENDMENT

THE CASE LAW IS OVERWHELMING TO THE EFFECT THAT THE DISCLAIMER PROVISION OF THE 1955 ACT DOES NOT VIOLATE THE FIRST AMENDMENT

This Court has decided no one case involving every issue and every fact presented here but the case law supporting Regents' position is so strong that they almost have an *embarras des richesses*. The strength of precedent favoring the Regents is even apparent from the Employees' Statement in that they must make fine distinctions, distinctions without meaning, or ask the Court to disregard precedent.

This lack of case authority does not mean that the appeal is frivolous. It does mean, as we will endeavor to show, that the Court must overrule, or

worse, ignore several cases to hold for the Employees on the merits. It does mean, also, that the questions presented are not substantial.

Thus, Employees write off *Konigsberg v. California*, 353 U. S. 252, and 366 U. S. 36, *In re Anastaplo*, 366 U. S. 82, and *Adler v. Bd. of Ed.*, 342 U. S. 485, as having been decided on the basis of "privilege." (Statement, p. 41.) It is true that, taken alone, certain language on p. 492 of *Adler* and p. 90 of *Anastaplo* seems to speak in terms of "right-privilege," but the cases certainly are not decided on this basis. This Court did not decide that a state could deny the right to practice law to members of a particular race or religion on the theory that state employment is a "privilege" which could be limited in any way, however arbitrary.

Nor can Employees successfully show that *N.A.A.C.P. v. Alabama*, 357 U. S. 449, or *Bates v. Little Rock*, 361 U. S. 516, corrodes *Adler v. Bd. of Ed.*, 342 U. S. 485; for underlying the *N.A.A.C.P.* decision, where this Court held that a state may not compel the disclosure of N.A.A.C.P. membership lists, is the premise that the *nature* of the organization is decisive. The Court was careful to distinguish *Bryant v. Zimmerman*, 278 U. S. 63, upholding a New York statute requiring disclosure of Ku Klux Klan membership.

Gerende v. Bd. of Supervisors, 341 U. S. 56, involving, as it does, the summary imposition of a civil disability upon a refusal to take an oath is

such strong authority against Employees' position that they are driven to relying upon the differences in the wording of the oaths. (Statement, p. 39) Parenthetically, on the same page, Employees erroneously state that the language defining subversive person in the Ober Act is identical to that in this case.

Beilan v. Bd. of Education, 357 U. S. 399, is certainly authority against Employees' position on the First Amendment argument, although it is not applicable to the procedural due process argument. (Statement, p. 39)

Most startling of all is Employees' attempt to distinguish *Garner v. Bd. of Public Works*, 341 U. S. 716. On page 38 Employees claim "* * * this Court did not explore and adjudicate the First Amendment question presented by this case." The fact is that the petitioners in *Garner* argued the First Amendment points extensively. But this Court, before coming to grips with the bill of attainder point, concluded on page 721 that, "This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose; *United Public Workers v. Mitchell*, 330 U. S. 75, and a State is not without power to do as much." Of course, *Mitchell* revolved largely around a First Amendment argument and the court discussed it extensively beginning on p. 95. It was not necessary for the court to repeat this entire discussion in *Garner*.

Hence, Employees' attempts to distinguish the foregoing cases are, we submit, unsuccessful.

May the state make the inquiry required by the 1955 Act without violating the public employee's First Amendment rights? The answer must be in the affirmative. *Adler v. Board of Education*, 342 U. S. 485, *Beilan v. Board of Education*, 357 U. S. 399. Nor does *Shelton v. Tucker*, 364 U. S. 479 cast a shadow on these cases; for, in that case, on page 485, footnote 4, this Court said, "The actual holdings in *Adler* and *Beilan*, involving the validity of teachers' discharges, are not relevant to the present case." (See our discussion of thise case and *Sweezy v. New Hampshire*, in Part IV, *infra.*)

The Employees' only hope is for a reversal of these cases. But the trend is against them. *Barenblatt v. U. S.*, 360 U. S. 109, 125-134; *Wilkinson v. U. S.* 365 U. S. 399; *Braden v. U. S.*, 365 U. S. 431; *Communist Party v. S.A.C.B.*, 367 U. S. 1, 96-103. The lower court was correct in pointing out that, "It cannot be questioned that a state has power to safeguard the public service from disloyalty; and the right of the state to inquire of its employees concerning their loyalty has been recognized in a number of cases." (Statement, page 10, Appendix.)

Regarding the form of the inquiry, the lower court held (Statement, page 13, Appendix), that there is no violation of First Amendment rights simply because a written form is used rather than an oral form, such as was used in *Beilan*. The key

question is whether the written form to be signed is limited to the area of legitimate state concern. The lower court added, "In an institution as large as the University of Washington, to conduct personal interviews of all present and prospective employees concerning their loyalty would be administratively burdensome and might be subject to abuses. In lieu of such inquiry the university officials have elected to require a sworn statement, narrowly limited to the precise matters of legitimate state concern. So limited, the oath serves the same purpose as individual inquiry." (Statement, pp. 13-14, Appendix.)

The First Amendment argument of whether the inquiry can be made should be treated separately from the Fifth Amendment argument of whether dismissal can be carried out on the basis of the answer or lack of answer given.

THE 1955 ACT IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT

Citing *Shelton v. Tucker*, 364 U. S. 479 as authority, Employees claim that the 1955 Act is void as an unconstitutional prior restraint on the grounds that the legitimate state interest could be more narrowly achieved by less drastic means. It is not clear whether Employees are relying on *Speiser v. Randall*, 357 U. S. 513, as well, when they cite it in their Statement on page 77. If so, this reliance is misplaced for on page 517, footnote 3, this Court stated:

> "Appellants also argue that these provisions are invalid * * * as invading liberty of speech * * * Our disposition of the cases makes consideration of these questions unnecessary."

A prior restraint is not, *ipso facto*, unconstitutional. *Times Film Corp. v. Chicago*, 365 U. S. 43. But it is true that this Court will not allow a state to abridge certain liberties where no substantial state interest is involved, and where the attempted abridgement is done in the guise of combating subversion. Thus a declaration that an Arkansas statute is justified because of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools cannot be used as a cloak to cover the attempt of a state to discover whether a teacher is a member of the N.A.A.C.P. *Shelton v. Tucker*, 364 U. S. 479. Nor can one making inquiry pursuant to the investigative powers of a legislature, and again in the guise of combating subversion, force an answer as to belief, abstract advocacy of Marxism, and the like. *Sweezy v. New Hampshire*, 354 U. S. 234.

Certainly *Shelton* is not authority for the proposition that every statute and oath are invalid where it is possible in any regard to narrow the scope of the statute or the oath without impairing its effectiveness. To go to such extremes would be to place an impossible burden on the legislative bodies. Not one of the oaths upheld by this Court would be valid if this were the test, since a few

moments reflection suggests changes which would bring them into sharper focus.

The oath and the statute involved in this case are a far cry from the statute involved in *Shelton*.

THE INTEREST TO BE PROTECTED IS SUBSTANTIAL

Perhaps the most crucial part of Employees' First Amendment argument concerns the lack of a societal interest to justify the 1955 Act. The Employees must show that the societal interest is not substantial, as in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Employees must somehow get around the two reports of the Joint Fact-Finding Committee on Un-American Activities. (The Joint Fact-Finding Committee on Un-American Activities was omitted from Employees' index, but is discussed in their statement beginning on p. 65.) This they have attempted to do by claiming that parts of the report are false (Statement, p. 64) and by claiming that the lapse of six years from the report's filing to the 1955 Act is too long for the findings to support the 1955 Act (Statement, p. 66).

The *Second Report Un-American Activities in Washington, 1948*, deals, in the main, with the University of Washington. It would serve no purpose to belabor this point. It is a part of the record and the Court may there examine not only the testimony of the six faculty members who were discharged or placed on probation, but also the

testimony of the former veterans counselor (*Second Report*, p. 304), the couple who ran a legitimate theater near the University (*Second Report*, pp. 265, 267), and the attorney who described how his son was influenced by faculty members (*Second Report*, p. 298).

There is no blanket requirement that every piece of legislation dealing with subversion be preceded by legislative findings, but it cannot be doubted that valid findings strengthen the legislation when its constitutionality is called into question. After reciting certain legislative findings on the nature of the communist movement too lengthy to be reported here, this Court in *Communist Party v. S.A.C.B.*, 367 U. S. 1, 94, said:

> "It is not for the courts to re-examine the validity of these legislative findings, and reject them. See *Harisiades v. Shaughnessy*, 342 US 580. They are the product of extensive investigation by committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 US 502. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 US 522; *American Communications Asso. v. Douds*, 339 US 382. * * *"

Nor will this Court give less weight to findings of a state legislature which come to the Court "encased in the armor wrought by prior legislative deliberation." *Bridges v. Calif.*, 314 U. S. 252, 261.

Conceding, arguendo, that conditions could change to such a degree as to vitiate a legislative

finding, we need not belabor the point that the dangers resulting from the communist movement referred to in the Joint Committee's report (House Journal 1949, p. 1095 *et seq.*) have not disappeared. This court has, in effect, recognized this fact by deciding the *Communist Party* case, *supra*, on June 5, 1961, although it was based on legislation dating from 1950 and 1954. Subversive activities legislation was passed in 1947, 1949, 1951, 1953 and 1955. Argument that any of this legislation is invalid because additional legislative findings were not made after 1949 seems strained, to say the least.

Employees claim, "* * * as the District Court failed to note, the 1949 session of the legislature enacted no 'anti-subversive' legislation." "It was not until 1951 * * * that such legislation was enacted." (Statement, p. 66) This is erroneous in view of section 2, chapter 242, Laws of 1949, set out in Appendix A, *infra*.

But Employees have even more difficulty attacking the validity of the legislative findings.

They claim, "At the time when that [1949] legislative session was beginning, the University of Washington was concluding its separate and immediate action to rid itself of employees, faculty and otherwise, who might have been subversive * * *" (Statement, p. 65). In fact, this action came only after the public disclosures of the Joint Fact-Finding Committee, which held hearings during 1948. Employees show no action on this score

in the years preceding 1948, nor do they show that any action would ever have been taken in the absence of the legislative prod.

A more surprising statement is found later on the same page: "During the hearings of the legislative committee, only ten members of the University of Washington faculty of 700 full-time members, were named, but not proved, as being or having been, members of the communist party." In view of the admissions of faculty witnesses on past membership (*Second Report*, 305, 199, 18, 131, 104, 243), the statement is plainly erroneous, if the word "proof" is still to have any meaning.

Employees apparently feel that six faculty members dismissed, or placed on probation, is a modest number. That the committee felt the number significant is apparent from the foreword to the *Second Report*.

From this sort of argument, Employees conclude that it is "extremely doubtful" whether the legislature in 1949 could "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." (Statement, p. 66.)

The Reports of the Joint Fact-Finding Committee reinforce what this court should decide in any event: There is an interest of the state in self-preservation which justifies the action of the legislature.

Employees knock down the same straw man they knocked down in their trial court brief when they say, "It is no answer to argue that state employment is a 'privilege' and not a 'right' and then infer that the infringements here are permissible because they infringe upon no rights." (Statement, p. 54.)

Regents gave no such answer in trial court and give no such answer here. (See the trial court's memorandum opinion, p. 24, Appendix, Statement.) Certainly, the wealth of material showing a substantial interest to be protected makes any such argument unnecessary.

Part IV

THE 1955 ACT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

THE EMPLOYEES ARE PROBABLY ENTITLED TO A HEARING

After *Nostrand v. Little, supra*, was remanded by this Court to the Washington high court for determination of whether the professors in this case would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activities act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor hav-

> ing tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

The matter of whether a person without tenure would be accorded a hearing was not before the court.

Three factors make it likely that, under Washington law, the Employees involved in this case would be accorded a hearing should they refuse to sign and request a hearing. These three factors are: the court's decision on remand in *Nostrand v. Little, supra*; the existence of two important pieces of legislation, the Administrative Procedures Act (chapter 234, Laws of 1959) and the State Civil Service Act (chapter 1, Laws of 1961); and the administrative practices followed by state agencies of allowing a hearing, even though a hearing is not specifically provided by statute.

With regard to the first of these factors, the real thrust of *Nostrand v. Little, supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28.77.120

and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable, as would be the case of a person without tenure.

With regard to the second factor, the Court should be mindful of the fact that there is a series of "filters" designed to guarantee due process of law by allowing a hearing. The first of these filters is the tenure code. This would afford many of the Employees involved in this appeal a hearing.

The second filter is the Civil Service Act. It is true that according to section 7 of the Act the provisions do not apply to academic personnel of the institutions of higher learning as well as to certain other employees. Thus, we cannot say for a certainty that it would not apply to certain non-academic personnel such as Annick Smith who is an assistant editor of the University of Washington Press. The Act has never been construed in this regard.

The third filter would seem to be fine enough to catch all of the Employees not given the right to a hearing by some other statute. This is the State Administrative Procedures Act. The Washington Administrative Procedures Act in section 9 provides in part as follows: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. * * *" Section 1 defines a contested case as "* * * a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or *constitu-*

tional right to be determined after an agency hearing." (Emphasis supplied.)

Gnecci v. State of Washington, 58 Wn. (2d) 467, 364 P. (2d) 225, a case decided *en banc* a few months after *Nostrand v. Little, supra*, indicates that under the State Administrative Procedures Act, such an employee would be provided a hearing if the lack of a hearing would deprive him of a constitutional right. The court seemed to be following the lead of this Court. (*See Wong Yang Sung v. McGrath*, 339 U. S. 33.) Moreover, this Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems where such interpretation is possible. *Fox v. Washington*, 236 U.S. 273.

It is true that the Employees argue on pages 90 and 91 of their Statement that under *Nostrand v. Little, supra*, neither the Civil Service Act nor the the Administrative Procedures Act could be used to accord the employees in this case a hearing but, in fact, the question of whether nontenured personnel could utilize either of these acts was not before the court. On page 121 of *Nostrand v. Little, supra*, our high court tried to preclude such claims by saying, "We, of course, limit our consideration of the problem to the facts before us."

In regard to the third factor, state agencies have, upon the advice of the state attorney general, on numerous occasions accorded a hearing to a party on the basis of the Administrative Procedures Act

where no specific hearing is provided by statute. An example of this is *In re Christensen*, No. 34575 Thurston County Superior Court, State of Washington. In this case the director of licenses granted a hearing to an applicant who had been refused a broker's license even though such a hearing was not specifically provided by the Real Estate Licensing Act (chapter 18.85 RCW). If an individual attempted to resign from a subversive organization by communicating with one of the members, it is possible this individual would not be sure whether his resignation was effective, many of such organizations not having membership cards. If such an individual were to ask for a hearing so that he might explain the steps he had taken to attempt to resign it seems most probable that the hearing would be allowed under Washington law and administrative practice.

With regard to the hearing issue our burden is light. We need not show for a certainty that a hearing would be granted. We need only show that under the statutes there is a possibility. "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 136.

Since a hearing is probably accorded under Washington law, it is probably not necessary for us to rely upon cases upholding the imposition of a civil

disability with no right to a hearing, such as *Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441, *Gerende v. Board of Supervisor of Elections*, 341 U. S. 56, *United Public Workers v. Mitchell*, 330 U. S. 75, and *American Communications Association v. Douds*, 339 U. S. 382. This last case, in which this court upheld the validity of the non-communist disclaimer of the Taft-Hartley Act (61 Stat. 136, chapter 120) is so plainly against the Employees that they have made little attempt to distinguish it.

The difficulties which the Employees have encountered in arguing that no hearing will be accorded them are evidenced by their argument. Thus, on page 83 of their Statement the Employees quote a portion of the District Court's opinion out of context and give the word "substantial" quite a different meaning. Certainly the District Court was not passing upon what would be a substantial question for the purposes of this appeal; rather from the context of the entire opinion it is apparent that the District Court was pointing out that an oath requirement which would not allow for a hearing is of questionable constitutionality.

The difficulty is further manifested by the manner in which the Employees have emphasized certain portions of the Regents' statement. A reading of the document simply indicates that the Regents intend to follow the law, it does not indicate that under the law no hearing would be accorded an employee. Like-

wise on page 87, the Employees have italicized the words "on any grounds" found in the 1955 Act. The effect would have been very different if they had italicized the following three words, to wit, "*shall be cause* for immediate termination * * *" (Emphasis supplied.) There is, of course, a great difference between a matter being a cause for immediate termination and a matter which must result absolutely in immediate termination. Finally, the difficulty Employees encounter has forced them to claim that our state high court has gone so far as to allow only a sham hearing. (Statement, pp. 86, 89.) This our court would not do and has not done.

THE 1955 ACT IS NOT UNCONSTITUTIONALLY VAGUE

In dealing with this question (Statement, starting on page 100), Employees' difficulty comes not from stating the general rules but from attempting to apply the general rules to this particular case.

The oath required, and the statutes on which it is based, are not unconstitutionally vague; the terms used therein are susceptible of objective measurement. (We discussed the matter of which statute is before the court in Part II and that discussion will not be repeated here.)

Employees have quoted no cases which militate against the validity of this oath. Surely the reference to *Cramp v. Florida*, 368 U. S. 278 on page 101 of the Statement was only to set forth the general rule; for the oath involved in *Cramp* can hardly be compared with the oath in the present case. It provides

in part, "* * * that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party * * *" (This is set forth more fully in Appendix B). The Court, itself, seems to have distinguished this case from *Cramp* when, on page 286 it pointed out that:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or Federal Government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms *susceptible of objective measurement.*" (Emphasis supplied.)

This Court denied certiorari in a case involving alleged vagueness of the Ober Act which, as pointed out earlier, is very similar to the 1951 Act. *Shub v. Simpson*, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861. Also significant, is the fact that this Court affirmed *Gerende v. Bd. of Supervisors*, 341 U. S. 56, a decision based upon the interpretation of the *Shub* interpretation. But even more significant is the fact that this Court has affirmed prison sentences—a far cry from this declaratory judgment procedure—stemming from statutes which make these upon which this oath is based seem clear by comparison. While to set forth these statutes would make this motion unduly prolix, the Court is referred to the statutes involved in *Dennis v. U. S.*, 341 U. S. 494; *Gitlow v. N. Y.*, 268 U. S. 652, and *Whitney v. Calif.*, 274 U. S. 357. Added to this is the fact that this Court refused to strike down oaths, and the statutes

upon which they are based, which are much more questionable than those in this case. (See the oath forms of *Garner v. Bd. of Public Works*, 341 U. S. 716 and *American Communications Association v. Douds*, 339 U. S. 382, set forth in Appendix B.)

It is not necessary to set forth the lower court's discussion relating to vagueness. (See, Statement, Appendix beginning at page 16.) The fact that a unanimous three-judge court found that the meaning was not "uncertain or vague—in any event not to the extent that the statute must be held unconstitutional * * *" is itself persuasive that the statutes are not void on their face. On page 17 the lower court pointed out that a person taking the oath, "* * * * is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed." He need only apply them to his own case.

Although the subject of subversion is susceptible to overdramatization, it should be pointed out that based upon the history of other nations, a statute would be of little use which included within its ambit only those who participate in the *putsch* itself. It must also include those who provide assistance by supplying weapons and the like. Second, an insurrection is not the work of one man and, as a result a statute, to be of any use, cannot include only those who *alone* carried out the attempted *coup d'etat*.

In their Statement, Employees did not attack the word "revolution," found in the 1951 statute as

being ambiguous by claiming that "revolution" could involve a peaceful and constitutional change. Perhaps it is because even if this word were found unconstitutional, only the word would be stricken under our state high court's ruling in *Household Finance Corp. v. State*, 40 Wn. (2d) 451, 244 P. (2d) 260. The companion words "force or violence" would remain.

Once it is determined that the statutes are not void on their face, *Fox v. Washington*, 236 U. S. 273, is applicable, holding that the Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional problems where any such interpretation is possible. See also *Shuttlesworth v. Birmingham Bd. of Ed.*, 358 U. S. 101. Our state high court would of course, be guided by Section 19 of the 1951 Act which provides in part that, "Nothing in this act shall be construed * * * to limit or infringe upon freedom of the press or freedom of speech or assembly, within the meaning and the manner as guaranteed by the Constitution of the United States * * *"

THE 1955 ACT DOES NOT INVOLVE AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF

Citing *Speiser v. Randall*, 357 U. S. 513, as authority, Employees claim that the 1955 Act involves a denial of procedural due process in that it shifts the burden of proof to the public employee. While the Employees' argument might have merit were the oath demanded of the public in general, it has no

merit whereas here the oath requirement is directed to a specific group, to wit, public employees. A much more substantial societal interest exists where a state inquires into the loyalty and fitness of its public employees than where a state inquires into the loyalty and fitness of the public veterans, or members of a particular race or religion.

The petitioner in *Speiser* prevailed in this Court because of an unconstitutional allocation of the burden of proof in a tax exemption proceeding. This Court went to great lengths to distinguish certain disclaimer oath cases involving a specified group where the oath requirement is backed up by a substantial state interest. Specifically, this Court on page 527, with reference to *Garner v. Bd. of Pub. Wks.*, 341 U. S. 716, *Gerende v. Board of Supervisors*, 341 U. S. 56, and *American Communications Association v. Douds*, 339 U. S. 382, said, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern." On page 528 the Court said, "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax

exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct." The *Speiser* case, then, cannot be used as authority to support the claim that the 1955 Act involves a deprivation without procedural due process.

Part V

OTHER CONTENTIONS OF EMPLOYEES CONSIDERED

THE 1955 OATH REQUIREMENT DOES NOT CONSTITUTE A BILL OF ATTAINDER

Employees' construction and interpretation of *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, and *United States v. Lovett*, 328 U. S. 303, demonstrate the invalidity of their argument that Washington's disclaimer oath requirement is a bill of attainder.

Employees admit that the oath in this case is prospective and cite no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Cummings* and *Lovett* cases and in *Ex parte Garland*, 71 U. S. (4 Wall.) 333, all involved punishment for past misdeeds. It is true that the punishment for past misdeeds was often conditioned on a future act, but in each case the individual punished could not have avoided the sanction. For example, as one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in

the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

At page 103 of Employees' Statement an out of context quote from Justice Frankfurter's concurring opinion in *United States v. Lovett, supra*, is used to support their argument that a bill of attainder need not also be *ex post facto* in order to be objectionable. A few more lines of quotation from that opinion demonstrate that the quote is not apposite. At page 323 of *U. S. v. Lovett*, Justice Frankfurter wrote:

> "Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. *But if it is not an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.*" (Emphasis supplied.)

Whether that statement was applicable in the *Lovett* case or not, we submit that it is certainly applicable in the present case. In other words, the fact that the action in the present case is prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A

member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign from a subversive organization as a condition of his employment by the state. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Employees wholly ignore the Washington Supreme Court's interpretation of the 1955 Act and the constitutional prohibition against bills of attainder. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10 (1959); (which, in this respect, is this same case in an earlier journey to this Court through the state courts) our court said at p. 476:

> "Respondents complain that the statute which requires them to execute the oath in question is a bill of attainder and, as such, contravenes Art. I, § 23, of the state constitution and Art. I, § 10, of the United States constitution. Their argument is substantially the same as that rejected by this court in *Huntamer v. Coe*, 40 Wn. (2d) 767, 246 P. (2d) 489 (1952), wherein we held that section 16, as implemented by section 1(e) of the act of 1951 (requiring a similar oath as a condition precedent to filing a declaration of candidacy for any public office), was not unconstitutional for these reasons.
>
> "Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is 'a member of the communist party or other subversive organization' at the time the oath is taken. No punishment for past conduct or political activity is involved. * * * *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716." (Footnotes omitted.)

The Washington Court followed the *Garner* case, *supra*, where this Court said on p. 720:

> "* * * The provisions operating thus *prospectively* were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service * * *; *and a State is not without power to do as much.*" (Emphasis supplied.)

The fact is that the oath requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra*; for here a member of a subversive organization may resign today and take the oath tomorrow. Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

If the oath was an employment qualification in the *Garner* case, it is an employment qualification here.

In the *Douds* case, *supra*, the Court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations.

If the oath was valid as regulating future conduct in the *Douds* case, it is so in the present case.

Hence, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

It is submitted that there is no merit to Employees' contention.

THERE HAS BEEN NO PRE-EMPTION OF THE 1955 ACT

The holding in *Pennsylvania v. Nelson*, 350 U. S. 497, so heavily relied upon by the Employees, has been reduced to its precise facts by *Uphaus v. Wyman*, 360 U. S. 72, 76-77 and *Sweezy v. New Hampshire*, 354 U. S. 234.

The portion of the state statute involved in the pre-emption argument in the *Sweezy* and *Uphaus* cases, *supra*, is the same as Washington's. The *Uphaus* case in 1959 is the last case to discuss "pre-emption." There the Court stated that the pre-emption contention "was denied *sub silentio*" in *Sweezy*, and thus, with these comparable statutes under consideration, the pre-emption argument appears foreclosed to Employees here as well. In *Uphaus*, at page 76, the court distinguished facts within the *Nelson* case from the case under consideration and stated:

> "* * * In *Nelson* itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the

> Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied.) 350 US, at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. * * *"

The court proceeded, then, to enumerate areas which states could certainly legislate against. (For an excellent discussion of the *Nelson* and *Uphaus* cases and loyalty oath requirements in general see Professor Cramton's article in 43 Minn. L. Rev. 1025, 1959.) The irrelevancy of cases cited in Employees' Statement preparatory to the pre-emption argument may be seen from the following:

In *The Exchange*, 7 Cranch 116, the court balances federal authority with foreign authority and that case has no relevancy here.

In the *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, the court held constitutional the power of Congress to prescribe bank notes as legal tender, and that debts created before and after such act can constitutionally be paid in such legal tender. This case is wholly irrelevant to the question here under consideration. Incidently, the quote on page 111 of the Statement is taken from a concurring opinion.

THE 1955 ACT DOES NOT REQUIRE SELF-INCRIMINATION

Employees' contention, that the 1955 statute is void as requiring plaintiffs to incriminate themselves with respect to their own disloyalty, is strained, without merit and should be rejected.

The state high court interpreted this statute in relation to the Fifth Amendment privilege against self-incrimination in *Nostrand v. Balmer*, 53 Wn. (2d) 460, 477, 335 P. (2d) 10, and found no merit in a similar contention. There the court stated:

> "Nor do we find merit in respondents' assertion that section twelve, as amended, violates * * * that clause of the Fifth Amendment to the United States Constitution which provides that no person 'shall be compelled in any criminal case to be a witness against himself.' Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, * * *."

Failure to sign the oath does not result in an inference of guilt concerning subversive activity or Communist Party membership. *Nostrand v. Balmer*, *supra*. Any possible prosecution for those crimes or for Employees' claimed anticipation of perjury would have to be affirmatively proved as elements of those crimes. The disclaimer oath would there be relevant only as the means which plaintiffs used to commit perjury.

Since Employees are not being required to give testimony against themselves, *Nostrand v. Balmer*,

supra, but are merely required, pursuant to the 1955 Act, to disclaim their knowing participation in subversive organizations, the statute does not impinge upon the Fifth Amendment privilege against self-incrimination. *Communist Party v. S.A.C. Board*, 367 U. S. 1; *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Lerner v. Casey*, 357 U. S. 468; *Cohen v. Hurley*, 366 U. S. 117; *Beilan v. Board of Education*, 357 U. S. 399; *Gerende v. Election Board*, 341 U. S. 56.

The holding of the three-judge district court should be upheld. That court stated at pp. 19-20, Appendix, Statement:

> "A further argument made against the validity of the loyalty oath statute is that it infringes upon the privilege against self-incrimination. There is no merit in this argument. The statutory requirement that government employees must answer relevant questions by written statement if they wish to establish their eligibility for employment does not require plaintiffs to give testimony against themselves. *The absence of any inquiry into past conduct and the implied inclusion of the element of scienter negate the potential danger of self-incrimination.* The statements in *Cramp, supra*, on which plaintiffs rely, were made in reference to an oath in language found to be unconstitutionally vague and are not applicable here." (Emphasis supplied.)

Finally, there is a short but conclusive argument which must be mentioned:

> "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself,

is not made effective by the Fourteenth Amendment as a protection against state action. * * *" *Adamson v. California*, 332 U. S. 46, 50; also *Twining v. New Jersey*, 211 U. S. 78, 91-98.

THE DISTRICT COURT WAS CORRECT IN DISMISSING EMPLOYEES' COMPLAINT WITH PREJUDICE

Following an extended discussion of the doctrine of equitable abstention in the Federal Courts, the Employees on p. 116 of their statement assign error to the dismissal of their complaint.

As we set forth in part VII of this motion, the three-judge court properly refused to adjudicate questions involving the 1931 Act. In any event, the dismissal with prejudice only precludes the Employees from bringing another action in the federal court until after the state court has authoritatively construed that act. *Martin v. Creasy*, 360 U. S. 219 (1959); *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962); *Cf.* annotation, Remission of issues to state courts, 3 L.ed. 2d 1827; (compare a similar order by this court in *Nostrand v. Little*, 362 U. S. 474 (1960) and 368 U. S. 436 (1962)).

The district courts order of dismissal following the memorandum opinion was not based upon equitable abstention as to the remainder of the case. The court clearly and extensively considered all of the Employee's contentions. The lower court upheld the constitutionality of the 1955 Act and the dismissal

was the proper order with which to terminate the litigation. The Employee's contention is without merit.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STUDENTS

Allowing the Students to challenge the constitutionality of the statutes involved here would do violence to a longstanding judicial principle. This Court observed in *United States v. Johnson*, 319 U. S. 302, 305, that it would refuse to decide any dispute which "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."

Accordingly, in *Poe v. Ullman*, 367 U. S. 497, this Court refused to pass upon the constitutionality of a state statute where the moving party was unable to show he was threatened with its immediate enforcement.

The general principle from these cases is applicable here since the statutes challenged in this case have no direct application to students, have never been enforced against students and were not intended to affect students. The Students cannot show even an indirect injury, for the required loyalty oaths impose no restriction on what an instructor may teach in the classroom.

Part VI

THERE IS NO ACTUAL CONTROVERSY IN THIS DECLARATORY JUDGMENT PROCEEDING ATTACKING AN AMENDATORY ACT

No actual or real controversy is presented to this Court. This is especially clear with regard to the Fourteenth Amendment argument, since there has been no actual refusal, as pointed out earlier. The resemblance between the "controversy" in this case and the "controversy" in *United Public Workers v. Mitchell*, 330 U. S. 75, also a declaratory judgment proceeding, is striking. In *Mitchell* a large number of appellants were attacking a portion of the Hatch Act (54 Stat. 767, 5 U.S.C. § 118j *et seq.*) forbidding active political management. The appellants in that case filed a large number of affidavits in which they set forth their desire to engage in political activities. The Court selected as an example one of these affidavits and reproduced it in footnote 18 on page 75. The resemblance between the statements of intention set forth in the affidavit in *Mitchell* and the statements of the Employees in the Pre-Trial Order is striking.

Only one of the appellants in the *Mitchell* case, George P. Poole, had, in fact, violated the provisions of the Hatch Act. The Court held on page 91 that the individual appellants, other than Poole, could not maintain the action. The present case is similar except that in the present case there is no employee

like Mr. Poole who has actually violated the 1955 oath requirement.

At times advisory opinions are useful. But "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers v. Mitchell*, 330 U. S. 75, 89.

Nor can the Employees get into the substantial question arena by the back door, so to speak, by utilizing the declaratory judgment procedure. In *Alabama Federation of Labor v. McAdory*, 325 U. S. 450, on page 461 this Court held that "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." After noting that a law which is constitutional as applied in one manner may violate the Constitution when applied in another the Court added on page 462:

> "* * * But 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' *Watson v. Buck*, 313 U. S. 387, 402. All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. The declaratory judgment procedure may be resorted to only in the sound

> discretion of the Court and where the interests of justice will be advanced and adequate and effective judgment may be rendered. * * *"

It should be added that the statute before the Court in the *McAdory* case was similar to the 1951 Act as amended by the 1955 Act in the present case in that both statutes are comprehensive and abound with questions which can be answered authoritatively only by the state high court. In fact, the Act in the present case seems to present more questions for interpretation than the statute involved in *Adler v. Board of Education*, 342 U. S. 485, which so troubled Mr. Justice Frankfurter. In addition, this case differs factually from *Adler* in that in *Adler* no oath form was proffered to the teachers. Hence, there was no problem of lack of a "refusal" which problem exists in the present case. A delay by the Court in *Adler* would not necessarily have caused that case to become more ripe for decision. Whereas, in the present case, an action brought after an actual refusal would settle many questions such as the right to a hearing.

Far from presenting a substantial federal question the real fact is that this case does not present a substantial controversy. An examination of the briefs in this case and of the briefs and decisions in the *Nostrand* cases, shows that there has already been too much litigation involving too little actual controversy.

Part VII

THE 1931 OATH OF ALLEGIANCE STATUTE

The 1931 oath of allegiance statute, chapter 103, Laws of 1931 (RCW 28.70.150 and RCW 28.76-.230), requires the professors and other teaching employees at Washington's state universities to subscribe to an oath which reads as follows:

> "I, the undersigned, do solemnly swear (or affirm):
>
> "(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, for reverance for law and order, and undivided allegiance to the government of the United States. * * *"

This statute has never been construed by the Washington Supreme Court. We adhere to the position urged below, adopted by the three-judge district court, and constantly reiterated by this court, namely "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962) and cases cited therein.

By drawing attention to certain parts of the pre-trial order, Employees, on page 121 and 122 of their Statement have given the impression that aliens are forced to take the oath required by the

1931 Act. This is not, in fact true. With the thousands of faculty members, it is possible that, by mistake, the signing of the 1931 oath may have been requested of an alien; but this is not the practice of the University of Washington and has not been the practice for many years.

The pre-trial order must be read as a whole. Thus the statement of President Odegaard on page 91 of the pre-trial order, and the paragraph on page 78 of the pre-trial order must be read along with page 77 where aliens are treated specifically. It reads, "For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and *at all times material to this cause*, has been *similar* to that suggested by the memorandum circulated through the department of Mathematics and reproduced below." (Emphasis supplied.) The memorandum referred to points out that, "The last clause of the first sentence which reads 'and undivided allegiance to the government of the United States' may be replaced by the phrase 'insofar as it is compatible with my citizenship in .....'" Who can say what other oath form would be "similar"? Yet, on page 119 of their Statement, Employees actually state, "* * * the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors. * * *" This Court cannot pass on a "modified" oath, which is "similar" to the one set forth in the above memorandum. One thing is certain. The very word "modified" means that it is *not* the 1931 oath.

Employees allege that this oath is arbitrary and hence void under the due process clause in that it requires aliens to take an oath of undivided allegiance to the United States, thereby placing them in the inconsistent position of averring undivided allegiance to one government while retaining the citizenship of their native country. The answer is that aliens at the University of Washington are not, and for some years past have not been, required to subscribe to the oath of allegiance in the form required by the 1931 law.

It is at least arguable that the legislature intended the words, "every person applying for a license to teach * * *" to cover not "every person" in the broadest sense but every person who should owe allegiance to this country. It is to be noted that legislation was enacted prohibiting aliens from teaching *in the common schools* (chapter 38, Laws of 1919, RCW 28.67.010, *et seq.*) Three decades later, chapter 32, Laws of 1949 (RCW 28-.67.020, part) amended Section 1 of the 1919 act to allow exchange teachers *in the public schools* "irrespective of requirements respecting citizenship and oath of allegiance." Neither statute referred to institutions of higher education. This demonstrates that the Washington Legislature in 1949 assumed that the 1931 act did not apply to institutions of higher education. But, of course, whether the long-standing interpretation of the 1931 act by the administrative agencies—even though it is entitled to

great weight—is the correct interpretation, is a question for the state courts.

On the merits, Employees have little or no authority to support their claim that the 1931 Act is invalid. In fact, *Re Summers*, 325 U. S. 561, supports its validity. There, this Court held that the refusal of a bar applicant to take an oath to support the state constitution is a ground for denying admission to the bar and is not a denial of due process under the Fourteenth Amendment. The state constitution had a provision requiring service in the militia in time of war. In that case the applicant refused because of his unwillingness based on personal scruples to serve in the state militia in time of war.

If a state can refuse to allow a person to practice law on this ground, surely a state can demand of a teacher, as a condition of employment, an oath of undivided allegiance.

The Employees, in the court below, raised several issues in regard to alleged vagueness of the language of the prescribed oath of allegiance. The three-judge district court on page 28, Statement, Appendix, replied as follows:

> "These contentions of vagueness of the oath of allegiance statute raise substantial constitutional issues, bringing into question as they do the meaning and intended scope of the statute. Although statutory construction may resolve these questions in such a way as to remove doubts concerning constitutionality, it appears that the Supreme Court of Washington has never had occasion to construe the oath of alle-

giance provisions of Chapter 103, Laws of 1931, although declaratory judgment proceedings are available in the Washington courts. Authoritative interpretation of the statute by the Washington court may avoid the constitutional issue, or show it in clearer perspective, or resolve it."

Thus, for three compelling reasons, an attack on the oath of allegiance statute by the employees must fail. First, one may not challenge the validity of a statute which does not affect him. *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Massachusetts v. Mellon*, 262 U. S. 447, 488. Second, one may not challenge the constitutional validity of a statute which has never been enforced. *Poe v. Ullman*, 367 U. S. 497 (statute prohibited sale of contraceptives). Third, one may not challenge the constitutional validity of a state statute before doubtful questions concerning the application of state law have been resolved by the state courts. *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, 228-229; *United Gas Pipeline Co. v. Ideal Cement Co.*, 369 U. S. 134, *supra*. Again, the 1931 oath of allegiance statute has never been construed by a Washington court. The latter point regarding state law presents a barrier to non-alien as well as alien Employees.

There is no reason to suppose that the Washington courts will not accord full constitutional protection to the employees. The two *Nostrand* cases are examples of the length to which our state court will go to protect constitutional rights under the statutes here in question.

The words of this court in *Martin v. Creasy*, 360 U. S. 219 (1959) are here particularly applicable. At page 225 the Court said:

> "There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." (Footnote omitted.)

CONCLUSION

During the past decade and a half, this Court has decided several cases which provide relatively accurate guidelines as to whether an oath violates a constitutional guarantee. Thus, a state cannot require an oath which does not contain the element of scienter; neither can it require an oath which is unconstitutionally vague. A state cannot carry out an unconstitutional abridgement of free speech in the guise of combating subversion. And a state cannot shift the burden of proof of disloyalty, where a large hetrogeneous group is involved, such as veterans, by an oath requirement.

This Court has upheld the validity of several oaths which, like the disclaimer oath in this case, do not contravene these guarantees.

Apart from precedent, this is a declaratory judgment proceeding attacking an amendatory act and lacking an actual controversy.

For these reasons, this Court should dismiss this appeal for want of a substantial federal question as to the 1955 Act, or in the alternative, affirm the lower court.

The 1931 Act has never been before any state court of any kind. For this reason alone, this Court should dismiss the appeal for want of a substantial federal question as to the 1931 Act, or in the alternative, affirm the lower court.

Respectfully submitted,

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APPENDIX A

WASHINGTON LEGISLATION RELATING TO SUBVERSIVE ACTIVITIES

HOUSE CONCURRENT RESOLUTION NO. 10.
(Session Laws, 1947, p. 1378)

Be It Resolved, By the House of Representatives, the Senate concurring, of the State of Washington in legislative session assembled:

WHEREAS, These are times of public danger; subversive persons and groups are endangering our domestic unity, so as to leave us unprepared to meet aggression, and under cover of the protection afforded by the bill of rights these persons and groups seek to destroy our liberties and our freedom by force, threats and sabotage, and to subject us to the domination of foreign powers; and

WHEREAS, Recent announcements by responsible officers of the federal government indicate the seriousness of the problem. J. Edgar Hoover, Director of the Federal Bureau of Investigation recently said: "During the past five years American Communists have made their deepest inroads upon our national life. Their propaganda, skillfully designed and adroitly executed has been projected into practically every phase of our national life. The Communist influence has projected itself into some newspapers, books, radio and the screen, some churches, schools, colleges and even fraternal orders have been penetrated, not with the approval of the rank and file, but in spite of them"; and

WHEREAS, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee;

Now, Therefore, Be It Resolved, That there is hereby created a Joint Legislative Fact-finding Committee on Un-American Activities in the State of Washington which shall investigate, ascertain, collate and appraise all facts concerning individuals, groups or organizations whose activities are such as to indicate a purpose to foment internal strife, discord and dissension; infiltrate and undermine the stability of our American institutions; confuse and mislead the people, and impede the normal progress of our state and nation either in a war time or a peace time economy; and

Be It Further Resolved, That in addition to other duties imposed upon the committee, the committee shall investigate the activities of groups and organizations whose membership includes persons who are communists, or any other organization known or suspected to be dominated or controlled by a foreign power, which activities affect the conduct of this state, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this state supported in whole or in part by state funds, or any political program; and

Be It Further Resolved, That the committee shall consist of four members of the House of Repre-

sentatives, appointed by the speaker thereof; and three members of the Senate appointed by the president thereof and they shall be subject to confirmation by their respective bodies. The speaker of the House of Representatives shall appoint the chairman of the board; and

Be It Further Resolved, That the committee hereby created in exercising the powers and performing the functions vested in it by this resolution shall have: (I) All the powers conferred upon legislative committees by chapter 6, Laws of 1895 and chapter 33, Laws of 1897; (II) except when inconsistent with this resolution, all the powers conferred upon committees by the rules of the House of Representatives, the rules of the Senate, and the joint rules of the Senate and House of Representatives as they are enacted and amended from time to time and such rules are hereby incorporated herein and made a part hereof the same as if they were set forth in this resolution in full; (III) all powers necessary or convenient to accomplish the objects and purposes of this resolution, including but not limited to the following duties and powers:

(1) To employ and fix the compensation of a secretary and such clerical, legal, expert and technical assistants as it may deem necessary, and to lease, rent or buy such supplies and facilities as may be required;

(2) The chairman shall have authority to create subcommittees from its membership, assigning

to the subcommittee any study, inquiry, investigation or hearing which the committee itself has authority to undertake or hold, and the subcommittee for the purpose of this assignment shall have and exercise all of the powers conferred upon the committee limited by the express terms of the resolution or resolutions of the latter defining the powers and duties of the subcommittee, which powers may be withdrawn or terminated at any time by the committee;

(3) To adopt and from time to time amend such rules governing its procedure (including the fixing of its own quorum and the number of votes necessary to take action on any matter) as may to it appear appropriate;

(4) To contract with such other agencies, public or private, as it deems necessary for the rendition and affording of such services, facilities, studies and reports to the committee as will best assist it to carry out the purposes for which it is created;

(5) To hold public hearings at any place in the State of Washington at which hearings the people are to have an opportunity to present their views to the committee;

(6) To make a complete study, survey and investigation of every phase of the subject of this resolution, including but not limited to the operation, effect, administration, enforcement, and needed revision of any and all laws in anywise bearing upon or relating to the subject of this resolution;

(7) To meet at any and all places in this state, in public or executive session;

(8) To act during this session of the legislature, including any recess hereof, and after final adjournment hereof until commencement of the thirty-first legislature;

(9) To file a report with the thirty-first legislature;

(10) To summon and subpoena witnesses, require the production of papers, books, accounts, reports, documents, and records of every kind and description; to issue subpoenas and to take all necessary means to compel the attendance of witnesses and procure testimony; to pay fees and traveling expenses of witnesses to insure their attendance, if necessary; to procure from any court having jurisdiction, upon complaint showing probable cause to believe that pertinent evidence is being concealed or withheld from the committee, a search warrant and cause a search to be made therefor;

(11) To cooperate with and secure the cooperation of county, city, city and county and other local enforcement agencies in investigating any matter within the scope of this resolution, and to direct the sheriff of any county to serve subpoenas, orders, and other process issued by the committee; and

(12) To do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution; and

in case of disobedience on the part of any witness to comply with any subpoena issued by the committee or on the refusal of any person to testify regarding any matter on which he may be lawfully interrogated, the superior court of any county, or the judge thereof, on application of the committee, shall compel compliance by proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein; and

Be It Further Resolved, That the committee, each of its members, and any representative of the committee thereunto authorized by the committee or by its chairman, is authorized and empowered to administer oaths; and

Be It Further Resolved, That every department, commission, board, agency, officer and employee of the state government, including the attorney general, and their subordinates, and of any political subdivision, county, city, or public district of or in this state shall furnish the committee and any subcommittee, upon request, any and all such assistance, and information, records and documents as the committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created; and

Be It Further Resolved, That the Washington state patrol and all officers and members thereof shall furnish such assistance to the committee as the chairman may direct; and

Be It Further Resolved, That the members appointed to the joint Legislative Fact-finding Committee on Un-American Activities shall be reimbursed for their expenses incurred while attending sessions of the committee or subcommittee to the extent of fifteen dollars ($15) per day plus five cents (5¢) per mile in going to and coming from meetings or hearings of the committee or subcommittee, the same to be paid upon their individual vouchers, approved by the chairman of the committee, from any moneys appropriated for the expense of the thirtieth legislature, or from such other funds as may be made available therefor; and that the salaries and expenses of any expert, clerical, and other assistants employed by the committee shall be paid upon vouchers approved by the chairman of the committee from such funds.

Passed the House March 3, 1947.

Passed the Senate March 8, 1947.

Laws of 1949, chapter 242, Sec. 2, at p. 948, thereof provides, in part:

SEC. 2. The following sums, or so much thereof as shall be severally found necessary, are hereby appropriated * * * *Provided*, That no part of any appropriation contained in this act shall be used to pay the salary or wages of any person who * * * advocates, or is a member of an organization that advocates, the overthrow of the government of the United States by force or violence: *Provided further*, That for the purposes hereof an affidavit filed with

the State Auditor by the payee prior to the issuance of any warrant, or in lieu thereof a certificate by the responsible officer certifying that the payee or payees for whom vouchers or payrolls are submitted have filed with such officer such affidavit, shall be prima facie evidence that the person making it, or filing the same with the responsible officer, has not acted contrary to the provisions herein set forth: *Provided further*, That any person who advocates, or is a member of an organization that advocates, the overthrow of the government of the United States by force or violence, and accepts employment the salary or wages for which are paid from any appropriation contained in this act, shall be guilty of a gross misdemeanor and shall be fined not more than one thousand dollars ($1,000) or imprisoned in the county jail for not more than one (1) year, or both.

CHAPTER 254, LAWS OF 1951

[S. B. 379.]

SUBVERSIVE ACTIVITIES ACT.

AN ACT to be known as the "Subversive Activities Act," defining the crime of sedition and of being a subversive person or organization and prescribing the punishment and penalties thereof; relating to the loyalty of candidates for public office and prescribing procedures of filing for election to public office; relating to the loyalty of officers and employees of the state or of any political subdivision thereof; prescribing procedures and providing for employment and discharge thereof; providing for the appointment of a special assistant attorney general, prescribing the duties thereof; making an appropriation; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. For the purpose of this act:

(a) "Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

(b) "Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

(c) "Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

(d) "Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

(e) "Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization.

SEC. 2. It shall be a felony for any person knowingly and wilfully to:

(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington or any political subdivision of either of them, by revolution, force or violence; or

(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the state of Washington or of any political subdivision of either of them; or

(c) conspire with one or more persons to commit any such act; or

(d) assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) destroy any books, records or files, or secrete any funds in this state of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person upon a plea of guilty or upon conviction of violating any of the provisions of this section shall be fined not more than ten thousand

dollars, or imprisoned for not more than ten years, or both, at the discretion of the court.

SEC. 3. It shall be a felony for any person after June 1, 1951 to become, or after September 1, 1951 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person upon a plea of guilty or upon conviction of violating any of the provisions of this section shall be fined not more than five thousand dollars, or imprisoned for not more than five years, or both, at the discretion of the court.

SEC. 4. Any person who shall be convicted or shall plead guilty of violating any of the provisions of sections two and three of this act, in addition to all other penalties therein provided, shall from the date of such conviction be barred from

(a) holding any office, elective or appointive, or any other position of profit or trust in, or employment by the government of the state of Washington or of any agency thereof or of any county, municipal corporation or other political subdivision of said state;

(b) filing or standing for election to any public office in the state of Washington; or

(c) voting in any election held in this state.

SEC. 5. It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the state of Washington and

any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the state of Washington a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the state of Washington, the funds to be deposited in the state treasury and the books, records, files and other property to be turned over to the attorney general of Washington.

VETOED

SEC. 6. The attorney general is hereby authorized and directed to appoint a special assistant attorney general. Said special assistant attorney general shall have the responsibility and authority to assemble, arrange and deliver to the prosecuting attorney of any county, together with a list of necessary witnesses, all information and evidence of matters within said county which have come to his attention, relating in any manner to the acts prohibited by this act, and relating generally to the purposes, processes and activities of communism and any other or related subversive organizations, associations, groups or persons.

VETOED

SEC. 7. For the collection of any evidence or information referred to in this act a special assistant attorney general is hereby authorized to call upon the attorney general, state patrol, and prosecuting attorneys, sheriffs, police chiefs, and any other state, county or municipal police authorities in this state to furnish such assistance as may come within the scope of their duties and legal authority. Nothing herein shall be construed as redefining, extending or granting any additional authority, powers or duties of such officers or agencies.

The special assistant attorney general, herein provided for, may testify before any grand jury or petit jury as to matters referred to in this act.

SEC. 8. The records of the special assistant attorney general shall not be made public or divulged to any person, except upon the written permission of the attorney general in order to effectuate the purposes of this act. The special assistant attorney general shall be authorized to establish such office or offices as shall be deemed are necessary and required for the effective operation of this act. To the extent that his time may not be required in the performance of his duties under this act, the special assistant attorney general shall be available for, and perform such other duties as may be assigned to him by the attorney general.

SEC. 9. The attorney general shall prepare and report to the governor, to the legislature, at or before the convening of each biennial session a concise statement of all matters pertaining to his official duties together with his recommendations for the enforcement of the provisions of this act.

VETOED

SEC. 10. The judge or judges of superior court of each county, when informed by the special assistant attorney general or by the prosecuting attorney of said county or counties, that there is information or evidence of the character described in section six of this act to be considered by a grand jury, may call such grand jury, and shall charge the grand jury to inquire into the violations of this act.

SEC. 11. No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state.

SEC. 12. Every person and every board, commission, council, department, court or other agency of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subver-

sive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury.

SEC. 13. The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof.

SEC. 14. Every person who, on June 1, 1951, shall be in the employ of the state of Washington or of any political subdivision thereof, other than those now holding elective office shall be required on or before July 1, 1951, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this act; namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended

to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this act. Such statements shall be prepared and execution required of and by every person and every board, commission, council, code department, court or other agency of the state of Washington or any subdivision thereof responsible for the supervision of other employees, for the employees under the jurisdiction thereof. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged.

SEC. 15. Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this act, shall be cause for discharge from any appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any county, municipality or other political subdivision of this state, or any agency thereof. The attorney general and the personnel director, and the civil service commission of any county, city or other political subdivision of this state, shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this act,

shall have the right of reasonable notice, date, time and place of hearing, opportunity to be heard by himself and witnesses on his behalf, to be represented by counsel, to be confronted by witnesses against him, the right to cross-examination, and such other rights which are in accordance with the procedures prescribed by law for the discharge of such person for other reasons. Every person and every board, commission, council, department, or other agency of the state of Washington or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the classified service in this section referred to, shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this act, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this act, shall promptly report to the special assistant attorney general in charge of subversive activities the fact of and the circumstances surrounding such discharge. Any person discharged under the provisions of this act shall have the right within thirty days thereafter to appeal to the superior court of the county wherein said person may reside or wherein he may have been employed for determination by said court as to whether or not the discharge appealed from was justified under the provisions of this act. The court

shall regularly hear and determine such appeals and the decision of the superior court may be appealed to the supreme court of the state of Washington as in civil cases. Any person appealing to the superior court may be entitled to trial by jury if he or she so elects.

SEC. 16. No person shall become a candidate for election under the laws of the state of Washington to any public office whatsoever in this state, unless he or she shall file an affidavit that he or she is not a subversive person as defined in this act. No declaration of candidacy shall be received for filing by any election official of any county or subdivision in the state of Washington or by the secretary of state of the state of Washington unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit as set forth herein.

SEC. 17. Every written statement made pursuant to this act by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who wilfully makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this act, or (c) under oath in any hearing conducted by any agency of the state, or of any of its

political subdivisions pursuant to this act, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this act, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury, as prescribed in chapter 9.72, R.C.W.

SEC. 18. If any provision, phrase, or clause of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this act which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this act are declared to be severable.

SEC. 19. Nothing in this act shall be construed to authorize, require or establish any military or civilian censorship or in any way to limit or infringe upon freedom of the press or freedom of speech or assembly within the meaning and the manner as guaranteed by the Constitution of the United States or of the state of Washington and no regulation shall be promulgated hereunder having that effect.

SEC. 20. This act may be cited as the Subversive Activities Act.

VETOED

SEC. 21. There is hereby appropriated from the general fund to the attorney general the sum of fifty thousand dollars, or so much thereof as may be necessary for the purposes of carrying out this act.

SEC. 22. This act is vitally necessary for the immediate preservation of the public peace, health and safety, and shall take effect immediately.

Passed the Senate March 8, 1951.

Passed the House March 6, 1951.

Approved by the Governor March 19, 1951, with the exception of sections 6, 7, 8, 10 and 21, which are vetoed.

CHAPTER 142, LAWS OF 1953

[S. B. 7.]

SUBVERSIVE PERSONS

AN ACT relating to subversive persons; amending section 9.81.010 RCW; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 9.81.010, RCW, is amended to read as follows:

(1) "Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

(2) "Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

(3) "Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

(4) "Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

(5) "Subversive person" means any person who

commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who *with knowledge that the organization is an organization as described in paragraphs two and three hereof, becomes or remains* a member of a subversive organization or a foreign subversive organization.

SEC. 2. This act is necessary for the immediate preservation of the public peace, health and safety, and support of the state government and its existing public institutions and shall take effect immediately.

Passed the Senate January 23, 1953.

Passed the House March 10, 1953.

Approved by the Governor March 17, 1953.

(Emphasis supplied.)

APPENDIX B

Disclaimer oath requirements involved in the leading cases decided by this court.

American Communications Assoc. v. Douds, 339 U. S. 382, 417 (1950).

Quotation taken from (61 Stat. 146, Ch. 120, 29 USCA § 159 (h)).

Affidavits showing union's officers free from Communist Party affiliation or belief

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Cramp v. Board of Public Instruction, 368 U. S. 278, 279 (footnote 1) (1961).

Garner v. Board of Public Works, 341 U. S. 716, 717-719.

In 1941 the California Legislature amended the Charter of the City of Los Angeles to provide in part as follows:

"* * * no person shall hold or retain or be eligible for any public office or employment in the

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[1] The statute in its entirety provides as follows:

"All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

"I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; *that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party;* that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation." Fla. Stat. § 876.05. (Italics added.)

The Supreme Court of Florida has construed the portion of the statutory oath printed in italics as follows: "We think the pertinent clause, despite its ungrammatical construction was meant to apply retrospectively and that it should be read as if it had been written 'I have not lent and will not lend' * * *." State v. Diez (Fla.) 97 So 2d 105, 109.

service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective [April 28, 1941], advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

> "In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof." Cal. Stat. 1941, c. 67.

Pursuant to the authority thus conferred, the City of Los Angeles in 1948 passed Ordinance No. 94,004, requiring every person who held an office or position in the service of the city to take an oath prior to January 6, 1949. In relevant part the oath was as follows:

> "I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, vio-

lence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California * * *."

The ordinance also required every employee to execute an affidavit "stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member * * *."

Gerende v. Election Board, 341 U. S. 56 (1951) 197 Md. 282, 78 A 2d 660.

The oath is set out in *Shub v. Simpson*, 196 Md. 177, 76 A 2d 332, 333. This oath must be read together with the construction placed on it by state authorities referred to in *Gerende*.

"No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of nomination required by the foregoing Article, an affidavit that he or she is not a subversive person as defined in this article; provided that, in the case of certificates of nomination for President or Vice President of the United States, the affidavit may be made on behalf of such candidates by those persons who file the certificate of nomination for such candidates. No certificate of nomination shall be received for filing by any Board of Supervisors of Elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid."

Speiser v. Randall, 357 U. S. 513, 516-517 (1958), Art. 20, § 19 Calif. Const. and in footnote 2—§ 32 Revenue and Taxation Code.

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[2]Section 32 provides:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution."

Article 20, § 19, of the California Constitution, adopted at the general election of November 4, 1952, provides as follows:

> "Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:
>
> * * *
>
> "(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.
>
> "The Legislature shall enact such laws as may be necessary to enforce the provisions of this section."

Wieman v. Updegraff, 344 U. S. 183, 184 (1952) (footnote 1).

---

[1] "I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means; that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach

or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof by force or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means;

"And I do further swear (or affirm) that during such time as I am—*(Here put name of office, or if an employee,) insert 'An employee of' followed by the complete designation of the employing officer, office, agency, authority, commission, department or institution.*

"I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means."

[2]The state officials named as defendants in Updegraff's suit took the position in the state courts that the statute was unconstitutional. Following a policy of the Oklahoma Attorney General not to appeal from adverse decisions of the state supreme court, these defendants are here only because they were made appellees by the appellant-intervenors. They have chosen in their brief merely to restate, without argument, their position in the court below.

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Appellees.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, et al.,
Appellants,
v.
DOROTHY BULLITT, et al.,
Appellees.

BRIEF OF APPELLANTS

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

OPINION BELOW

The unanimous opinion of the three-judge United States District Court, rendered February 9, 1963, has been reported in 215 F. Supp. 439 (W. D. Wash. 1963). A copy of this opinion and the judgment and final order in this case have been printed in the Record at pages 235-264.

JURISDICTION

This class action was filed on June 6, 1962, in the United States District Court, Western District of Washington, Northern Division, by sixty employees of the State of Washington employed at the University of Washington. (R. 1-6.) This suit was filed pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983. *Bell v. Hood*, 327 U.S. 678. The complaint prayed that two statutes, and their required

oaths, of the State of Washington, on their faces and as they have been sought to be applied to appellants, and others similarly situated, be declared and adjudged, by the District Court, to be unconstitutional, void and of no effect, and that certain named state officials, and their successors, be permanently enjoined from further enforcing, operating and executing said statutes, and their required oaths, and that appellants be granted costs, and other equitable relief as may be proper. (R. 12.)

Upon the filing of the complaint a three-judge district court was convened pursuant to 28 U.S.C. §§ 2281 and 2284, and on July 13, 1962, it heard arguments on appellants' motion for an interlocutory injunction and on appellees' motions to dismiss. The motions to dismiss were denied, except as to four student plaintiffs, appellants here, who were dismissed from this action by the District Court. (R. 44.) A temporary injunction was granted pending a full hearing on the merits. (R. 234.) Several lengthy pre-trial hearings were held; an extensive pre-trial order was prepared containing many stipulations, including one that no oral testimony would be presented at hearing, but that, without objection, the testimony of several persons would be, and has been, set forth in the pre-trial order, and another stipulation that a number of exhibits were admitted without objection. (R. 48-83, 88-234, 279-317.) After hearing and opinion, the District Court, on February 25, 1963, entered a final judgment and order in this case that Chapter 377, Laws of Washington, 1955, was "not unconstitutional" and that no declaratory judgment would be rendered as to the constitutionality of Chapter 103, Laws of Washington, 1931. Its final judg-

ment ordered that the complaint of appellants be dismissed with prejudice. (R. 235-264.)

Notice of appeal to the Supreme Court of the United States was filed with the United States District Court, Western District of Washington, Northern Division, on April 23, 1963. (R. 265-274.) The Jurisdictional Statement was filed with this Court on June 20, 1963, and on October 14, 1963, this Court noted probable jurisdiction. (R. 318.)

The jurisdiction of the Supreme Court of the United States to review, by way of direct appeal, the decision in this case by the District Court, Western District of Washington, Northern Division, is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court directly to review the judgment and order entered in this case: *Bailey v. Patterson*, 369 U.S. 31, *Shelton v. Tucker*, 364 U.S. 479; *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73; and *Palmetto Fire Ins. Co. v. Conn.*, 272 U.S. 295. And see *Gerende v. Bd. of Supervisors*, 341 U.S. 56; *Adler v. Bd. of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Higher Education*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234, *Speiser v. Randall*, 357 U.S. 513, and *Cramp v. Florida*, 368 U.S. 278.

UNITED STATES CONSTITUTIONAL PROVISIONS, WASHINGTON STATE STATUTES AND OATHS INVOLVED

The provisions of the Constitution of the United States of America which are involved in this case are: U. S.

Const., Article I, Section 10; Article VI, and Amendments I, V and XIV. Because of their lengths, the pertinent texts of these provisions have been set forth in Appendix A.

The statutes involved are: Chapter 103, Laws of Washington, 1931, (RCW 28.70.150, RCW 28.76.230) and Chapter 377, Laws of Washington, 1955, amending the Washington Subversives Activities Act, Chapter 254, Laws of Washington, 1951, (RCW 9.81.010 et seq.). These statutes and their required oaths are printed in Appendix A to this brief of appellants.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. *Whether two enactments of the Washington Legislature, Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, on their faces and as they have been sought to be applied to appellants, and to others similarly situated, are unconstitutional in that they are repugnant to the Constitution of the United States of America in the following respects.*

1. By violating the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution, in abridging the constitutionally protected freedoms of religion, speech and conscience, association, assembly and academic freedom:

(a) By infringing upon each and every one of the constitutionally protected freedoms without an evidentiary showing made anywhere in the record that the state possesses a nexus, or a subordinating regulatory interest, which is compelling, or without any showing herein of

a need for the state to protect itself from a substantial danger, be that danger clear, present, or otherwise, existing by reason of the current or past employment at the University of Washington of advocates of the proscribed doctrines and associations, or by the employment of those persons who refuse or fail to promote "by precept and example" the doctrines required by the 1931 statute, or by the employment of appellants, and others similarly situated, who, for the reason of fear of possible recrimination and on the added grounds of conscience, academic freedom and constitutional liberty, refuse to sign the declarations demanded of them, that they do not so advocate or associate, or that they will so promote the state-approved doctrines;

(b) By infringing upon each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of unconstitutional conditions upon either the continued enjoyment of employment, or future employment, at the University of Washington by requiring that appellants, and others similarly situated, relinquish their constitutionally protected rights and freedoms as a condition precedent for their continued employment at the University of Washington, where, as in this case, the evidence and record are barren of any showing by the state of any danger which the state could properly abate, or which would justify the state's demand for an invasion and consequent relinquishment of said rights, and which would justify the imposition of conditions upon employees of the University of Washington which are incompatible with the conditions necessary for

an atmosphere of free inquiry and independent thought essential and necessary for realization of academic liberty at that University;

(c) By abridging each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of prior restraints upon appellants, imposed by language which is fluid, vague, shifting, speculative and uncertain, and through sanctions, including the threats of: discharge from their employment, guilt, infamy, scorn, disloyalty, findings of unfitness for employment, and prosecutions for subversion and/or perjury; thus, forcing appellants, and others similarly situated, to restrict their areas of constitutionally protected freedom; and where the herein described prior restraints are unnecessary because two available and adequate alternative procedures, having the same purposes as the oaths in issue, currently exist and are available, and are used, by the University of Washington, each such alternative is designed for a selective approach to this area rather than the blanket attack on constitutional freedoms curtailed by the oath enactments here in question;

(d) By infringing upon the constitutionally protected freedoms from the establishment of religion and/or abridging the free exercise thereof and freedom of conscience, through the necessary operation and compulsion of these enactments which function in an automatic and summary manner without affording appellant employees any opportunity to decline participation in the state prescribed ritual and without affording a hearing at which a refusal to participate could be explained, defended, or justified;

(e) By infringing upon each and every one of the constitutionally protected freedoms, and denying due process of law, because these enactments function in an arbitrary and discriminatory manner being summary and automatic, without affording appellants their following constitutionally protected rights: (1) to a reasonable notice of charges, (2) to a hearing, (3) to an opportunity to cross-examine witnesses supporting charges against them, (4) to an opportunity to present witnesses on one's own behalf, (5) to an opportunity to be represented by counsel, (6) to the presumption of innocence, (7) to have the accusing party carry the burden of proof, and (8) to avail themselves of the protections afforded by the rules of evidence; and such denial of constitutionally protected rights is accomplished by fluid, vague and indefinite standards thereby further deterring the enjoyment of constitutionally protected freedoms;

(f) By infringing upon each and every one of the constitutionally protected freedoms and due process of law, through statutory use of indefinite and vague standards, not susceptible of objective measurement, and which are so ambiguous, fluid and shifting that necessarily men of ordinary capacities, (including appellants), at their peril, must guess as to the meanings of these standards and are forced to speculate as to the nature of penal, and other laws that might be applied to them, thereby denying reasonable advance notice of the circumscribed areas of proscribed speech and association, subverting the presumption of innocence and shifting the burden of proof.

2. By violating Article I, Section 10, Clause 1 of the

Constitution of the United States, in that said enactments are Bills of Attainder, resulting in legislative infliction of pains, penalties, and punishment by conclusively presuming guilt, infamy, disloyalty and unfitness for employment at the University of Washington said legislative infliction of punishment and pain being made against appellants, and others similarly situated, without affording them their rights to trial or hearing, right to accusation, confrontation and cross-examination, or assistance of counsel, thus necessarily subverting the presumption of innocence, shifting the burden of proof, and altering the rules of evidence.

3. By violating the exclusively vested federal power over foreign affairs and by infringing upon the supremacy clause found in Article VI of the Constitution of the United States in attempting to regulate and restrict that sedition directed against the Government of the United States, and not being strictly confined to that sedition directed against the State of Washington, thereby impinging upon a field entirely within the province of the federal government, and which the President and Congress of the United States, by their exclusive powers as vested by the Constitution and by Congressional enactments, have preempted and wholly occupied.

4. By violating the due process clause of the Fourteenth Amendment, and through it the incorporated privilege against self-incrimination found in the Fifth Amendment, in abridging these constitutionally protected freedoms through the imposition upon appellants of a statutory requirement that appellants, and others similarly situated, as a condition of continued employment, give evidence

that may incriminate them, and otherwise bear witness against themselves.

B. *Questions relating to Chapter 103, Laws of Washington, 1931.*

5. Whether the District Court, after determining that Section 4 of the 1931 Act was clear and that it unambiguously operated in a summary manner: "There can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal to sign the oath," properly refused to enter a declaratory judgment and permanent injunction as to Section 4 of the enactment, inasmuch as it infringes upon and abridges constitutionally protected freedoms.

6. Whether the District Court, after determining that one section of the 1931 Act raised substantial constitutional issues, properly refused to render a declaratory judgment upon all the provisions of the 1931 enactment, prior to its actual enforcement, solely on the ground that the record fails to show that any appellant had "suffered actual injury by reason of the application of the oath of allegiance statute" (Chapter 103, Laws of 1931).

7. Whether the legislature of the State of Washington possesses constitutional power and authority to disqualify absolutely from the profession of teaching in any school, private or public, an otherwise fully qualified citizen of the United States of America on the sole ground that he refused, when requested, to testify that, *inter alia*, "he will by precept and example promote respect for the flag and the institutions of the United States of Amer-

ica and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

8. Whether the lower court properly held that all alien appellants, and others similarly situated, fail to present the requisite interest necessary to challenge the constitutional validity of the 1931 statute on the sole ground, contradicted by an express stipulation and exhibit in the record to the contrary, that the administering state officers intend to violate their statutorily imposed duties and to apply said statute unevenly, differentiating between aliens and citizens, by altering for aliens the prescribed statutory wording of the oath.

9. Whether the 1931 enactment is repugnant to the Constitution of the United States by violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in arbitrarily requiring that said statutorily-worded oaths be executed by the citizen faculty members of the University of Washington of whom there ~~is less~~ need for said oaths, if any need exists at all, and not requiring exactly the same worded oath from the alien faculty members who are similarly situated and of whom there would appear to be greater need for said oaths, if any need be existing.

C. *Question Regarding Standing of Student Appellants.*

10. An additional question is whether the lower court properly dismissed four students of the University of Washington, non-employees, plaintiffs below, solely on the ground that they lack the requisite interest to challenge

the validity of the oath-requiring statutes here in question when their challenge to said enactments is taken on the ground of their rights to academic freedom and when this action adjudicates those constitutional rights and the conditions for realizing learning freedom at the University of Washington.

STATEMENT OF THE CASE

This case involves the power of a state legislature to classify American citizens and aliens for employment at the University of Washington through the use of test oaths based on speech and associations, and on the basis of their willingness to swear that by precept and example they will promote certain legislatively approved ends, including "undivided allegiance to government." More specifically, this case involves the power of a state legislature to demand that all members of the academic faculty, whether alien or citizen, and all state employees generally, abandon and/or deter their exercise of several of their constitutional rights to free conscience, speech, association and publication; and also that all faculty members swear that "by precept and example" they will "promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States," as a necessary condition of qualifying for classification into a smaller group, from which, if substantively qualified, they may become eligible for employment at the University of Washington. The constitutional problems posed by these legislative classifications, it will be noted, arise in the vital, and fragile, areas of academic freedom, and affect the rights of free conscience, political speech, association and expression.

The University of Washington

The University of Washington is older than the State of Washington, and is one of two state universities. It is located primarily in Seattle, Washington. It employs many thousands of persons, and it offers academic, scientific, research and professional education in numerous fields to more than 25,000 persons annually (R. 89-90). The budget of the University derives about 60% from funds appropriated by the legislature of the State of Washington with the remaining 40% coming from diverse sources, the second largest percentage, 21%, coming from the federal government and private contract research. (R. 90.) In recent years, this second category of funds has been increasing in its percentage share of the total University budget (R. 90). That the University is one of our great institutions of higher learning and creative research in the United States is revealed by the activities it undertakes through its fifteen schools or colleges: The Graduate School; The College of Architecture and Urban Planning; The College of Arts and Sciences; The College of Business Administration; The College of Education; The College of Engineering; The College of Fisheries; The College of Forestry; The School of Nursing; The College of Pharmacy; The School of Social Work; The School of Librarianship; The School of Law; The School of Medicine; and The School of Dentistry. The anticipated future of the University is one of growth and expansion of students and faculty. It is expected that the University increasingly will become a center for graduate and advanced professional work, although retaining its commitment to a strong undergraduate program (R. 179). The educational and

research activities of the University of Washington are fully described in the Record at pages 89-150.

Appellants

Appellants in this case are sixty employees of the State of Washington, employed in various capacities at the University of Washington. (R. 151-6.) At least eleven of them earn a salary in excess of $10,000 annually. (R. 176.) Most of the appellants, including three tenured professors who are aliens, are tenured members of the faculty, and serve the University in both professorial and research capacities. Some appellants are faculty members without tenure, while a few have been hired on renewable three-year contracts (R. 294-5, 302-3), and the remaining appellants are non-tenured, non-teaching members of the University staff—several serving as research associates; one as a micrometeorologist; another is an assistant editor of the University of Washington Press; two are secretary-typists, and another is a detailer in the cyclotron department. (R. 151-6.)

The professorial appellants have been members of the University of Washington faculty from one to thirty-three years. They serve in many different schools and departments within the University and have distinguished themselves, and the University of Washington, in many respects: e.g., Born in Europe, Professor Z. W. Birnbaum, professor of mathematics, is Director of the University's Laboratory of Statistical Research. (R. 46.) Dr. Birnbaum has been employed by the University for 24 years and is an international scholar. His original education took place in Poland, and he later taught mathematics at the Uni-

versity of Lwow, Poland. (R. 46-8.) Professor Birnbaum engaged in post-doctoral study at the University of Goettingen, Germany. In addition to his education in mathematics and law in Europe, he has done mathematical research in the United States, and has received various fellowships, including a Guggenheim grant, which enabled him to carry out further studies. (R. 47.) Dr. Birnbaum has published one book, more than forty original research articles, plus a large number of other publications, such as book reviews, critiques, etc. (R. 47.) He is a member, and attends meetings, of many organizations limited to American membership, such as the American Mathematical Society and the Mathematical Association of America. (R. 48-51.) Also, he is a member, and attends meetings, of international organizations, such as the International Congress of Mathematicians and the Institute of Mathematical Statistics. (R. 50.) Professor Birnbaum attends these meetings as an official delegate from the University. (R. 52.) His membership in these organizations is a necessary part of his professional duties (R. 51, 58-9), and his attendance at the International Congress of the Institute of Mathematicians is sponsored by the U. S. Office of Naval Research. (R. 52.) These associations and meetings bring Professor Birnbaum, and others similarly situated, together with scholars from throughout the world, including communists who come from the Soviet Union and other Iron Curtain countries such as Poland, Hungary and Czechoslovakia. (R. 50, 51.) The communist scholars who attend these meetings can be expected to be interested in furthering the goals of the communist regime. (R. 57-8.) At these meetings, and elsewhere, Professor

Birnbaum associates with some of the most outstanding Russian mathematicians. (R. 50-1, 52.) He is the President-Elect of one of these international organizations, the Institute of Mathematical Statistics, and his work, as its officer, would require that he come into contact with, further the interests of, and aid, advise and teach, other scholars, including communist scholars from the Soviet Union, and other Iron Curtain countries, and including further, giving aid and assistance to those communist scholars who are seeking information, and who want to visit other countries, and who contemplate visits to the United States. (R. 53-7.) It is entirely feasible that the assistance, aid, guidance and teaching, that Professor Birnbaum renders to Soviet scholars, and other communist scholars, could be used by the Soviet Union government for military purposes (R. 55, 57), just as the United States government could, and does, use the information which it obtains from Professor Birnbaum. Professor Birnbaum cannot execute the required oaths and continue to engage lawfully in these associations and activities, particularly in those academic and professional activities necessary for the assimilation of international up-to-date research findings and of transmitting them to his colleagues and students. (R. 58-9, 67, 69, 71-2, 79, 80.) Professor Birnbaum fears that, were he to execute the oaths, then he might be found to be engaging in "subversive activities" or to be a "subversive person," or a member of a "subversive organization," or a "foreign subversive organization" (R. 67-8) and further, he fears the threat of perjury. (R. 68 and 80.)

Dr. Paul Dietrichson, an associate professor, is a Nor-

wegian citizen. His major field of study is philosophy, particularly existential philosophy and the metaphysical foundations of ethics. (R. 214.) Dr. Dietrichson has published articles and reviews in American and European journals and presently is the recipient of a grant from the David Swenson-Kierkegaard Memorial Fund to write a book on Kierkegaard's philosophy. He has published one book, Introduction to Philosophy. An alien, Professor Dietrichson refuses to execute the demanded oaths. (R. 214-18.)

Dr. Boris A. Jacobsohn is Director of the Summer Institute for Theoretical Physics at the University of Washington and is a senior faculty member in the Physics department. (R. 189.) Dr. Jacobsohn is an internationally known scholar, having collaborated on fundamental matters of physical theory, in mutual teaching, aid, advice and cooperation, with Dr. R. M. Ryndin of the Joint Institute for Nuclear Research, Dubna, Soviet Union. Their collaborative articles appear in 6 Physical Review Letters, No. 1, Jan. 1, 1961, and 24 Nuclear Physics 505-509 (1961). (R. 188-9.) Professor Jacobsohn expects to continue in these types of associations, but cannot execute the required oaths and engage in the type of activities described above. However, his continued participation in this type of activity is essential to his calling as a Professor of Theoretical Physics. (R. 189.)

Dr. Rhoads Murphey is professor of Geography and is a member of the Far Eastern and Russian Institute at the University of Washington. He has published a textbook, An Introduction to Geography (1961), and is the Editor of the Journal of Asian Studies, which is devoted to re-

search in the humanities and social sciences concerned with Asia. (R. 202.) In his latter capacity, and as a scholar in his field, Dr. Murphey is responsible for aiding, advising and teaching scholars throughout the world, including Communist academicians from the Soviet Union and Communist China. He must, and does, associate with them in foreign organizations. Dr. Murphey is a member, and attends meetings, of the International Congress of Orientalists which brings him into direct contact with international scholars, some of whom are Soviet and, more particularly, Chinese communists, and where Dr. Murphey engages in frequent meetings and discussions with them. (R. 203.) The International Congress of Orientalists surely is a "foreign subversive organization." Were Professor Murphey to sign the oath, he could no longer participate in these necessary associations. Nor could he "discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses" in which he teaches and of the fields of academic exploration in which he works. (R. 203-6.)

Dr. W. Stull Holt is a professor of American History, and American Foreign Policy, serving the University of Washington since 1940, and having been chairman of that department for fifteen years. (R. 193.) Dr. Holt is the author of eight books and many articles. He has distinguished himself, and the University of Washington, in many ways, holding such titles as Advisor to the Officer of the Chief of Military History; Councilman of the American Historical Society; President of the Pacific Coast Branch of the American Historical Society, etc. Dr. Holt

has served the United States in two World Wars, being decorated in World War I with the American Silver Star and the French Croix de Guerre, and in World War II with the American Bronze Star and the British O. B. E. (Officer of the Order of the British Empire). (R. 194.) Professor Holt refuses to sign oath Form A because were he to sign, then he would either have to violate his oath, thus risking the penalties of loss of employment, perjury, and abridging his conscience, or he would have to abide by his oath and inject the required, but historically incorrect, doctrines into his teaching, and make numerous changes in both his scholarship and attitudes, and in his public and private expression of his political and related views. (R. 195-6.)

Dr. Melvin Rader is a professor of social and moral philosophy and aesthetics, and has, with distinction, served the University of Washington and the academic community for thirty-three years. Dr. Rader is an internationally known scholar and author, being highly respected for such books as: A Modern Book of Esthetics (3rd ed. 1960); No Compromise (1939); Ethics and Society (1950), and The Enduring Questions (1956). He will publish another book, Ethics and the Human Community in 1963. (R. 206-8.) Professor Rader has authored articles, or parts of books, such as "Soviet Communism" found in Twentieth Century Political Thought (1946); "The Moral Basis of Peace" and "International Protection of Individual Freedom Within the State" in If Men Want Peace (1946); "Soviet Ideals and Postwar Cooperation" in Moscú, Soviet Far East and Pacific Northwest (1944), and "On Teaching Communism in the Public Schools."

U. of W. College of Education Record, May 1962. (R. 208.) Since Dr. Rader is professor of social and moral philosophy he open-mindedly must deal directly with the original source materials of Communist thought and ideology. He frequently studies, and he requires that his students read, and master, such items as Marx's, The Communist Manifesto, and The German Ideology, and Lenin's, The State and Revolution.

There can be no doubt of Professor Rader's commitment to the Constitution of the United States and its Bill of Rights, and he has twice been chairman of the American Civil Liberties Union of Washington. (R. 209.)

However, Professor Rader has been a member of several organizations which seemed to have justified, in the minds of some, an investigation, in 1948, of Professor Rader by the Washington Committee on Un-American Activities. After its investigations, the Committee charged him, in a unanimous report to the 31st Washington Legislature, January, 1949, with having committed perjury before it, and with having been closely associated with twelve organizations which had been officially cited as Communist fronts and subversive. (R. 210-11.)

The three reports of this committee have been made part of the record in this case, but these reports have not been reproduced in the printed record because of their lengths. (R. 230.) However, all the pertinent sections of the report of the Washington Committee on Un-American Activities made to the 31st Washington Legislature, January, 1949, which singled out Professor Rader for special commentary to the 1949 Legislature of the State of Washington, are reproduced verbatim below:

MELVIN RADER

"In the case of Melvin Rader, Associate Professor of Philosophy at the University of Washington, the Committee's investigating staff and an agency of the Federal Government have produced evidence showing conclusively that Professor Rader did not tell the truth when he testified before the Committee.

"Mr. Rader was identified by one George Hewitt, a former member of the National Committee of the Communist Party, as having attended the Briehl school in Communist training in New York State in the summer of 1938 or 1939.

"The precise summer was later established as that of 1938.

"Mr. Rader testified that during the period in question he taught at the University of Washington summer school and that he spent a vacation at Canyon Creek Lodge near Granite Falls.

"Your Committee's investigators have established that Mr. Rader's first appearance at Canyon Creek Lodge was in August of 1940, and that there was a six-weeks' period when he did not teach summer school at the University in 1938.

"The Federal agency heretofore mentioned has in its possession the testimony of two witnesses who corroborate Mr. Hewitt's statement that Professor Rader was in New York in the summer of 1938.

"All of this evidence has been made available to the proper state authority and has been made available to the administration of the University of Washington and to the Board of Regents.

"The Committee's published report of the second public hearings does not disclose that Professor Rader refused to confront Mr. Hewitt and actually "ran out" on Mr. Hewitt.

"When Mr. Hewitt informed your Committee that he recognized Rader as a former attendant of the

Briehl school for Communist educators, your Chairman immediately invited Professor Rader to his office.

"Professor Rader came into the executive office but as soon as he saw Hewitt, and before a word had been spoken, he turned on his heels and said he refused to have any conversation. As Rader hurriedly left, Mr. Hewitt again identified him positively as the Mr. Rader that attended the Briehl school. Upon leaving the room Rader said he would not talk without his attorney. Your Chairman then courteously invited him to return with his attorney. Shortly thereafter, Attorney Ed Henry, claiming to represent Professor Rader, showed up but Rader was not with him.

"Professor Rader would have had every opportunity, had he returned with Henry, to examine and cross-examine Hewitt, as did Henry. Hewitt persisted in his identification but Rader was not there to offer any denial.

"Your Committee enters this in its report to the Legislature to contradict and refute the manufactured stories that Professor Rader was not given an opportunity to confront and question his accuser. There is no record of this in the Second Report because events herein related took place in the Committee's executive offices. This is the first time they are publicly disclosed.

"Professor Rader is shown by the fully authenticated and documented records of your Committee to have been sponsor for, speaker for, or to have been otherwise directly associated with, twelve organizations which have been officially cited as Communist Fronts and subversive.

"Your Committee feels that the perjury charge filed against Mr. Hewitt was not only hasty and unwarranted but of political significance.

"Your Committee feels that it would be a proper subject of inquiry for the Thirty-first Legislature to ascertain why the recently appointed Prosecutor of

> King County, after first admitting the validity of the evidence placed before him and definitely committing himself to seek dismissal of the perjury charge against Mr. Hewitt, later reversed himself and explained that: (1) he was committed to his predecessor, now a member of the Superior Court bench, not to do so; and (2) that it might cost him 12,000 votes when he runs for election to take such a step."

Subsequent investigations of Professor Rader's alleged attendance at the Briehl school in communist training, and his alleged associations with twelve subversive organizations, were conducted by many people, including Professor Vern Countryman of the Yale Law School, and now Dean of the School of Law at New Mexico, a local newspaper, the *Seattle Times*, and by Mr. Smith Troy, then Attorney General for the State of Washington. (R. 212.) These investigations established beyond all doubt that Professor Rader was actually in the State of Washington at the time the committee alleged that he was attending a New York school in communist indoctrination. (R. 212), and that, significant portions of the Report of Washington's Committee on Un-American Activities are absolutely false and without foundation in fact. After reviewing the unassailable evidence, University of Washington President, Raymond B. Allen, issued a statement completely exonerating Professor Rader. (R. 212.) A report of the Rader Case appears in Countryman, Un-American Activities In The State of Washington (1951). (R. 212.)

Nevertheless, several facts remain: three sworn witnesses impugned Professor Rader's truthful testimony; an official committee of the State Legislature unanimously charged him with false swearing; a New York judge as-

serted that Professor Rader should be the subject of a grand jury investigation; his reputation was clouded; Professor Rader's academic employment was in jeopardy for a year; his credit rating fell, and, during that time, Professor Rader was frequently attacked in the newspapers (R. 212). The Un-American Activities Committee Chairman, Mr. A. F. Canwell, repeatedly called for Professor Rader's prosecution for perjury, and, on at least one occasion, a radio broadcaster reported that Professor Rader was a communist. (R. 212.) In a libel suit, Professor Rader later collected damages from the radio broadcaster. (R. 212.)

The attacks made upon him are not events of the remote past, but continue to the present day, due, in part, to the past record. Professor Rader has continued to be the subject of recent attacks, made by newspaper and otherwise, to the effect that he is still a member of communist front organizations; that he continues to hew to the communist party line, and that he is a master of deceit, each of which is false. Professor Rader cannot sign the oaths, because, were he to do so, then, it is not at all unlikely that he would be charged with perjury. (R. 212-3.)

It would unduly lengthen this statement to review the history of each remaining appellant. They have distinguished themselves in many ways, bringing scholarly respect to the University of Washington. For many of them, the performance of their academic duties necessarily brings them into close collaboration and association with communists, and several teach, advise and aid com-

munists in many ways, and by many means, some of which may very well help the Soviet Union and Communist China achieve their military and other purposes. A few of the many achievements and academic distinctions, along with several of their necessary associations with communists, appear in the pre-trial order (e.g., see Drs. Wilcox, Dawson, Fleagle, English, and Keller (R. 191, 192, 193), and Professor Valentine. (R. 196-9.)

Two appellants, Drs. Matchett and Orians, and others similarly situated, are members of the religious order known as the Society of Friends (Quakers). (R. 189.) They refuse to execute the oaths on religious grounds which are protected by the First Amendment to the Constitution of the United States of America.

Additional Operative Facts

It has been expressly agreed and stipulated that at all times material to the issues in this case, appellants, and others similarly situated, have refused to sign all oath forms which have been demanded of them and continue to do so; that appellants, and others similarly situated, have no speedy or adequate remedy at law, and that "unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants) and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (R. 174.)

Appellees, defendants below, are members of the Board of Regents, Charles E. Odegaard, President of the Uni-

versity, and John J. O'Connell, Attorney General for the State of Washington. (R. 156.)

Since the 1955 statute, in question in this suit, was enjoined for seven years from 1955 to 1962, appellees during that time required no oaths, either the oath required by the 1955 or 1931 statute, of any employee, and none was administered to employees of the University of Washington. (R. 165-9.) During that time, and to the present, the appellees, Board of Regents, President of the University and the Attorney General, have been and are without knowledge that any University of Washington faculty member, student, graduate or ex-student or any guest, visitor or listener to public lectures at the University of Washington has been charged in any judicial proceeding brought under the Washington Subversive Activities Act. (R. 187-8.)

Nor, has any official agency of government, local, state or federal, brought facts to the attention of any of the appellees that, as a result of the teachings and activities of appellants, and others similarly situated, any student or ex-student of the University is in violation of Washington's Subversive Activities Act, and further, appellees are without knowledge that any appellant, or others similarly situated, in any way, uses his position of employment to engage in or promote activities designed to achieve the violent overthrow, by force, of national or state governments. (R. 187-8.)

Dr. Charles E. Odegaard, President of the University of Washington, stated that oath forms A and B (absent statutory requirements) are not necessary qualifications

of fitness to teach or to do research at the University of Washington; that the existing recruitment and personnel procedures practiced at the University during the past seven years, as improved from time to time, are adequate to protect the legitimate public interest in securing qualified and trustworthy personnel, and that some qualified applicants for academic positions have been reluctant to accept employment on the condition of executing oath forms A or B. (R. 178.)

Glenn Leggett, Vice Provost of the University of Washington, is in charge of supervising academic personnel records. He stated that a physicist who previously had been hired by the University of Washington, resigned, accepting a position at the University of Birmingham [Birmingham-Southern at Birmingham, Alabama], when informed that execution of the oaths, required by the statutes here in question, were conditions precedent to academic employment; that, in 1962, after dissolution of the injunction in *Nostrand v. Little*, 58 Wn.(2d) 111, 361 P.(2d) 551, 362 U.S. 474, 368 U.S. 436, and the resumption of the oath requirements which had been enjoined since 1955 (R. 185), several executive officers of the University indicated to him that the University would be less successful in its academic recruitment policy, and further, that one professor who was then negotiating an academic appointment with the Department of Philosophy, refused a position at the University of Washington because, in part, he would have to execute the oaths in issue in this case before he could qualify for academic employment as a philosopher. (R. 184-5.)

In accordance with the facts of their knowledge, appel-

lants can testify that they have not, and do not, use their positions of employment at the University of Washington in any such ways as knowingly to bring about violent overthrow, by force, of state or national governments. (R. 175.) It is further stipulated and agreed that:

"23. Unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs, and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (R. 174.)

"22. Plaintiffs . . . have no speedy or adequate remedy at law." (R. 174.)

"41. All plaintiffs are of the opinion that if they executed the oaths in question said execution would cause each of them emotional anguish due to having to compromise their principles, beliefs and consciences." (R. 188.)

"42. All plaintiffs fear that if they executed either Oath forms A or B that they may subject themselves to harrassment and the threat of prosecution for perjury." (R. 188.)

"38. All plaintiffs are of the opinion that they cannot execute Oath Form A or B and that they refuse to swear or affirm that they 'understand and are familiar with the contents' of RCW 9.81.010(2), (3) and (5); RCW 9.81.060; RCW 9.81.070, and RCW 9.81.083, and RCW 28.70.150, 'subject to the penalties of perjury.'" (R. 188.)

"40. All plaintiffs are of the opinion that the requirement that they sign the oaths in question is an affront to their personal and professional integrity, an abrdigement of their civil liberties and constitutional rights secured and guaranteed under the First, Fifth and Fourteenth Amendments to the Constitution of the United States." (R. 188.)

"21. At all times material to this cause, plaintiffs, and others similarly situated, have refused to execute the oath forms demanded of them and continue to do so." (R. 174.)

The Statutes In Issue

The sole issue in this case is the constitutionality, on their faces and as sought to be applied herein, of several statutes of the State of Washington, and their required oaths (R. 158-162, 170), as set out in Appendix A hereto. Although the District Court declined to make any findings of fact, which had been requested by counsel, the operative facts in this case are undisputed, there being no evidence in the record to rebut them. (R. 222, 45-83, 88-238, 279-317.)

The 1931 Statute

In 1931, without holding any hearings on the subject and without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 103, Laws of Washington, 1931, Section One of which sets forth, in statutory terms, the following oath:

"I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." (R. 158.)

Section One of the 1931 statute further provides that the taking of said oath shall be an absolute and mandatory condition precedent for each and every person applying for, or renewing, a contract to teach in the State of Wash-

ington. If this required oath is not executed annually, then, as the section provides: "No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation." (R. 158.)

No person in the State of Washington is qualified to engage in the profession of teaching, in public or private schools, without first having obtained prior state approval. (See Chapter 97, Subchapter 4, Article VII, § 1, p. 306, Laws of Washington, 1909, and *State ex rel Shoreline School District No. 412 v. Superior Court*, 55 Wn.(2d) 177, 346 P.(2d) 999) And, since no person in the State of Washington can legally obtain a certificate to teach or enter into a teaching contract without executing the above stated oath, it stands as a mandatory condition precedent for each person to execute prior to his entry into the teaching profession or prior to his executing a contract to teach in that state. Section Two of the 1931 Act demands that the oath of undivided allegiance be sworn to by every "professor, instructor or teacher employed by any state institution of higher learning . . ." (RCW 28.76.230.) Any contract entered into without the prescribed oath having been subscribed to is, automatically, rendered null and void by Section Four of the 1931 Act, and any affiant who subscribes falsely to the statutory oath of undivided allegiance, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010, et seq.). The 1931 enact-

ment, as the District Court declared, operates automatically, thereby excluding all possibilities of a hearing where a tenured or non-tenured faculty member at the University of Washington, be he alien or citizen, could explain, defend or justify his refusal to subscribe to the oath.

The 1955 Statute

In 1955, and without holding any hearings, and without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 377, Laws of Washington, amending the 1951 Subversive Activities Act (RCW 9.81.010 et seq.). This amendment sets forth a requirement in addition to those imposed by the 1951 Subversive Activities Act, *viz.*, that the official heads of each state agency, thus including the Board of Regents of the University of Washington, shall require that each and every employee, or applicant for state employment, at every such agency, thereby including all members of faculty and staff of the University of Washington, shall state under oath whether or not he or she knowingly is a member of the communist party or other subversive organization, or is a subversive person as those terms have been set forth in the definitional sections of the 1951 Subversive Activities Act. (R. 170-173.). This 1951 Act, like the 1955 Act, is included as part of the penal code of Washington, and through it various crimes of subversion are denounced. Printed forms of the required oath (see Appendix A) in the following language have been distributed to all employees of the University.

"I further certify that I have read the provisions

of RCW 9.81.010(2), (3) and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury." (R. 170.)

This last quoted sentence, required by express statutory enactment (RCW 9.81.110), calls into play the Washington perjury statute (RCW 9.72.010), and, in addition to loss of employment, that statute makes any knowing misstatement in the oath form subject to the penalties of perjury, carrying a term of imprisonment in the state penitentiary for not more than fifteen years.

Section 1 of the 1951 Subversive Activities Act (Chapter 254, Laws of Washington, 1951, RCW 9.81.010 et seq.) makes the following definitions of Subversive Person, Subversive Organization, and Foreign Subversive Organization:

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets; advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3)

hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (R. 171.)

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence." (R. 172.)

"*Communist Party Declared to Be Subversive Organization.* (This section was added by the 1955 Act.)

"The communist party is a subversive organization within the purview of Chapter 9.81 and membership in the communist party is a subversive activity thereunder." (R. 172.)

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (R. 172.)

This last section is not qualified in any way by terms such as overthrow of government by *force, violence* or *revolution*.

The remainder of the 1951 Act is briefly described. Section 2 of the 1951 Subversive Activities Act, not directly in issue in this case, but relevant to it, makes it a felony to engage in certain defined "subversive activities"; these definitions of crime are more expansive, but highly similar to those definitions found in the oath required by the 1955 Act here in issue; Section 3 makes it a felony to remain or become a member of a subversive organization or foreign subversive organization knowing such organization to be such. Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office and from voting in state elections. Section 5 provides for the dissolution of such organizations and the distribution of their property. Sections 6, 7, 8, 10 and 21 were vetoed, and Section 9 requires that the attorney general report to the governor and legislature biennially.

Section 11 absolutely disallows any "subversive person" from eligibility for all state employment and public office. Sections 12 and 13 require that each board or agency of state government institute independent procedures to determine whether any employee is a "subversive person," and Section 14 requires that every state employee, as of June 1, 1951, submit a written statement to his agency to the effect that he or she is not a "subversive person," and that if an employee fails to submit the statement or submits an admission that such employee is a "subversive person," then he "shall immediately be discharged." Section 15 requires the discharge of any "subversive person" if reasonable grounds exist to believe that any state employee is such, and Section 16 requires that all candidates for public office file an affidavit that he is not a "subversive

person.". Section 17 makes any misstatements by employees punishable as perjury, and Section 18 is a severability clause. Section 19 states that the Act shall not be construed so as not to authorize civilian or military censorship or as to infringe upon freedom of speech or other constitutional guarantees. Section 20 provides the short title of the Act, "The Subversive Activities Act," and Section 22, the final section, declares that the Act shall take effect immediately.

The definitional sections of the 1951 Act, set forth above and incorporated into the 1955 Act, have twice been passed upon by the Washington State Supreme Court (*Nostrand v. Balmer*, 53 Wn.(2d) 460, 335 P.(2d) 10, and *Nostrand v. Little*, 58 Wn.(2d) 111, 361 P.(2d) 551) (R. 165-68.) The Washington court has authoritatively construed the reach of the definitional sections holding, over argument to the contrary, that these sections extend to the limits of their literal breadths. The breadth of these authoritative constructions were ignored by the District Court when it passed on the issues below.

In *Nostrand v. Balmer*, *supra*, counsel for respondent-professors argued, among other contentions, that the sweep of the definitional sections of the Act, incorporated into the oath, abridged the professors' freedom of speech and assembly as they are protected by the First and Fourteenth Amendments to the Constitution of the United States. (Brief of Respondents, pages 43-59; *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477). Counsel for respondent-professors, citing *Sweezy v. New Hampshire*, 354 U.S. 234, urged that the Washington Supreme Court construe

the Washington Subversive Activities Act in a manner similar to that employed by this court, with reference to the Smith Act, in *Dennis v. U. S.*, 341 U.S. 494, and *Yates v. U. S.*, 354 U.S. 298. (Brief of Respondent, pages 39-43). However, the Washington court refused so to limit the applications of the definitional sections of the 1951 Washington Subversive Activities Act, incorporated into the 1955 Act. (R. 167.)

On remand, in *Nostrand v. Little*, *supra*, the breadth of the definitional sections was not in issue, this Court having remanded that case solely on the question whether, before their dismissal for refusal to execute the required oaths, professors were entitled, under the Subversive Activities Act, to a hearing where they might explain or justify their refusal to sign. However, the Washington State Supreme Court, *sua sponte*, discussed the breadth of the Washington statutes and compared them with the breadth of Arkansas statutes which had been found, by this Court, to be unconstitutionally broad because the statutes asked of Arkansas teachers more than that necessary to effectuate the state's legitimate interests. *Shelton v. Tucker*, 364 U.S. 479. The Washington court held that "[un]like the Arkansas statute, our Act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130.

The 1955 amendment to the 1951 Subversive Activities Act provides that "refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for a refusal to accept his or her application for employment." This amended statute likewise has been authoritatively construed by the Washington State

Supreme Court. (R. 168.) In an earlier case, the Washington Supreme Court held that neither the 1955 amendment nor the 1951 Subversive Activities Act affords professors a hearing where they might explain, defend or justify their refusal to take the oath. (R. 168, 169.) (*Nostrand v. Little*, 58 Wn.(2d) 111, 132, 361 P.(2d) 551, 564.) In addition, the Washington Supreme Court held, over argument to the contrary by the state attorney general, that Washington's model state administrative code (Chaper 234, Laws of Washington, 1959, RCW 34.04.010 et seq.) does not entitle professors at the University of Washington to a hearing should they refuse to execute the oath; the model administrative code of 1959 "was not intended to supersede established procedure adopted by the regents . . . there is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington, which have been in effect for fifty years." (*Nostrand v. Little*, 58 Wn.(2d) 111, 132, 361 P. (2d) 551, 564.) But, the Washington Supreme Court did declare that, if a professor should refuse to execute the oath, then, before dismissal, he will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations . . ." (*Nostrand v. Little*, 58 Wn.(2d) 111, 131, 361 P.(2d) 551, 563.)

Under the provisions of Chapter 25 (Exhibit No. 3) of the administrative code governing the University of Washington at the time of the decision in *Nostrand v.*

Little, supra, a full-time member of the faculty had tenure if "he is a professor or associate professor . . ." or if he has held any full time faculty rank continuously for six years, and certain other minor categories not here important. Holding of tenure means that "no faculty member having tenure as defined . . . shall be removed from his position or subjected to discriminatory reduction of salary until he has been given opportunity for a hearing . . ." (See Chapter 25 of the Administrative Code of the University of Washington found in Appendix to *Nostrand v. Little, supra.*) The tenure provisions of the administrative code of the University of Washington do not apply evenly to all academic positions below the rank of associate professor; thus, many assistant professors, most instructors, and all lecturers, pre-doctoral associates, teaching fellows, and all members of the faculty on acting or visiting or research appointments, etc. do not have tenure and are not entitled to a hearing before their discharge, for failure to execute the disclaimer oath as required by the 1955 amendment to the Washington Subversive Activities Act of 1951.

Administrative Rulings with Regard to Tenure

Washington law expressly vests final control over the university in an administrative board, the University's Board of Regents, providing that (RCW 28.77.130):

> "The Board of Regents shall:
> (1) Have full control of the university . . . and employ members of the faculty who shall hold their positions during the pleasure of the board of regents;

At its meeting on May 25, 1962, and after the decision of the Washington State Supreme Court in *Nostrand v. Little, supra,* the Board of Regents of the University of Washington, making specific reference to the 1955 amendment and to the 1951 Subversive Activities Act, changed the administrative code governing the tenured faculty members of the University of Washington. (R. 169.) The Board ruled that a new ground for dismissal of tenured faculty members had been added to the administrative code: to wit, failing to execute the oaths here in question as required by State law. (R. 173-4.) The relevant minutes of the May 25th meeting, pages 16-17, reveals that the Board of Regents ruled that:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with provisions of Washington state law which is binding upon the Board of Regents."

> "They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, *maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the state of Washington.*" (emphasis in original)

> "In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the state of Washington and, therefore,

cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath." (The relevant portions of the Minutes of May 25, 1962, appear in Appendix "B," attached hereto.)

The responsibilities and obligations of the Board of Regents in relation to the disclaimer oath are imposed by the laws of the State of Washington—one of them is in question in this case—Chapter 377, Laws of Washington, 1955. This law directs that the Board of Regents "shall require of every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party, or other subversive organization and refusal to answer shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (R. 172-3.) Another statute, found in the 1951 Subversive Activities Act, Chapter 254, Laws of Washington, 1951, Section 14, requires that employees make written statements under oath; it provides further responsibilities and obligations of the Board of Regents that "Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged." (R. 173.)

On May 28, 1962, after the Board's change in the Administrative Code regarding tenure, and upon advice from defendant John J. O'Connell, Attorney General for the State of Washington, defendant Charles E. Odegaard, President of the University of Washington, acting upon the direction of defendant regents, demanded that each

and every employee of the University of Washington, including all members of the faculty, alien and citizen, tenured and non-tenured, execute an oath form, either form A or B, which would satisfy the requirements of the above described statutes as they may apply individually to each employee. (See Appendix A and R. 158, 168-9, 176.) Oath forms A and B were distributed (R. 23, 24, 31, 184) and demands were made upon all employees, faculty and non-faculty, to execute them; whereupon, some employees did execute said oath forms and other employees, appellants here, and others similarly situated, resisted. (R. 34-5, 303-4.) Oath form A, applying to the teaching faculty, carries two oaths, and was designed to satisfy the oath requirements of both Washington statutes involved in this case. Oath form B, applying to non-faculty, non-teaching employees, carries an oath designed solely to satisfy the requirements of the 1955 statute (Appendix A and R. 168-9).

This suit, a class action under Rule 23 (a) of the Federal Rules of Civil Procedure was instituted on June 6, 1962. (R. 1-2, 174.)

SUMMARY OF ARGUMENT

I.

The 1931 and 1955 oath statutes of the Washington legislature have been sought to be applied to appellants, professors, researchers and other employees of the University of Washington (R. 176), in violation of appellants' rights to freedom of conscience, speech, association and assembly guaranteed by the First and Fourteenth Amendments.

The attempt by the legislature here is not one of legislative inquiry, seeking to gain information upon a subject area over which it may legislate. The attempt here is to see to it that professors, and others, at the University of Washington, abstain from engaging in certain kinds of speech and associations which are fully protected by the First Amendment, but which the Washington legislature requires to be abandoned, and/or deterred, as a condition of continuing University employment; and further, the attempt here is to prescribe that certain other speech and conduct, "by precept and example," must be undertaken and executed by every professor as non-substantive conditions of his university employment, or else his teaching contract "shall be and is hereby declared to be null and void." Ch. 103, Section 4, Laws of Washington, 1931. "If he declines to sign, the employee is subject to immediate discharge." *Nostrand v. Little*, 58 Wn.(2d) 111 at 125 (1961).

The destructive impact upon freedom of academic and political expression arising from an application of test oaths to professors, and other university employees, has

been abundantly demonstrated over the past several decades. It is now clear that a state's legislative power to prescribe test oaths and other conditions of employment on a university campus is limited by the First and Fourteenth Amendments. *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Higher Education*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234; *Shelton v. Tucker*, 364 U.S. 479, and *Cramp v. Florida*, 368 U.S. 278.

In many cases, e.g., *Noto v. U. S.* 367 U.S. 290; *Scales v. U. S.*, 367 U.S. 203, and *Yates v. U. S.* 354 U.S. 298, this court has announced that state power does not extend to control and regulate hortatory speech which advocates the moral propriety of forcible overthrow of government, short of incitement to action to that end, nor may a state control a person's knowing, but inactive, membership in organizations that actively espouse forcible overthrow. This principle draws the line between peaceful change and threats of immediate violence, and excludes the peaceful areas from regulation by state legislation. Yet, it is precisely these areas which the 1931 and 1955 oath enactments seek to enter and control. The breadth of the oaths goes well into the areas of peaceful social change, academic discussion and knowing, but inactive, membership. At these points, the Washington legislature transgressed the bounds of legitimate state power, and appellants are justified in invoking the First Amendment (*DeJonge v. Oregon*, 299 U.S. 353; *Wieman v. Updegraff*, *supra*, and *Sweezy v. New Hampshire*, *supra*) and appellants are justified in standing silent (*Shelton v. Tucker*, *supra*; *Speiser v. Randall*, 357 U.S. 513, and *West Va. v. Barnette*, 319 U.S. 624) and in not executing the 1931 or 1955 oaths.

This Court has set forth the principle that when a state legislature seeks to control freedom of expression and free conscience that: (1) there must exist a subordinating state interest; (2) there must be a substantial relation between that freedom regulated by a state legislature and the state's subordinating interest; (3) the legislative control can only extend precisely, and no further than that necessary to vindicate the state's interest, and (4) the burden of demonstrating each of the above, (1), (2), and (3), is upon "the state convincingly [to] show . . ." *Gibson v. Florida*, 372 U.S. 539, and *Am. Comm. Ass'n v. Douds*, 339 U.S. 382. The record in this case is barren of any legislative justification for the 1931 or 1955 oath statutes. Whether one applies a literal interpretation of the First Amendment, the clear and present danger test, or a balance of interests test, the 1931 and 1955 oath statutes must be precluded from an application to appellants, and others similarly situated.

We respectfully submit that the balance of interests test is fallacious and should be overruled, at least in the area of academic freedom.

A fundamental principle of the First Amendment is that where a state can, and does, show a subordinating regulatory interest, meeting each of the conditions above, *Gibson v. Florida, supra*, then "[i]n a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479 at 488. The 1931 and 1955 oath statutes, in their inner webbing, pre-

sent a total of over 51,000 permutations and combinations (Ex. 14), each of which is a separate method of legislative control over appellants' freedom of expression and free conscience. It cannot be doubted that they broadly stifle fundamental personal liberties. The breadth of this "legislative abridgement must be viewed in light of less drastic means for achieving the same purpose." *Shelton* at 488. The record in this case reveals that the purpose of the 1931 and 1955 oaths is also being thoroughly, but selectively, achieved by several other means, less drastic in breadth of abridgement, and currently functioning on the University of Washington campus. Thus, the 1931 and 1955 oath statutes function as prior restraints on First Amendment freedoms, and must be precluded from an application to appellants, and others similarly situated.

The oaths unjustifiably invade appellants' First Amendment rights to freedom of, and from, religion,—the core of which is freedom of conscience. No justification for such invasion has been made, and appellants cannot refrain from participating; thus, their rights to free conscience have unconstitutionally been abridged.

II.

The Washington oath statutes, and their required oaths, also contravene the due process clause of the Fourteenth Amendment in that no hearing is afforded appellants in which it could be determined whether their non-execution of the oaths was excusable or justifiable, because, under the statutes, no such grounds can be accepted by any hearing officer. The Washington oath statutes, and their

oaths, are arbitrary, *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551, and indiscriminately lump the innocent with the guilty, *Wieman v. Updegraff*, 344 U.S. 183, and shift the burdens of persuasion and proof, under the threats of dismissal and/or perjury prosecution, *Speiser v. Randall*, 357 U.S. 513.

III.

The Washington statutes and their oaths also contravene the due process clause of the Fourteenth Amendment in that they deter freedom of expression because each is stated in such fluid, vague and uncertain language that it is impossible to ascertain its meaning or limit its scope to situations properly within state authority. The 1955 oath is particularly sweeping having been construed by the Washington Supreme Court to extend to its literal breadths. *Nostrand v. Little*, 58 Wn.(2d) 111 at 130. No professor at the University of Washington can be sure where the oaths end; nor can he be sure that wholly innocent and well-intentioned conduct on his part will not subject him to dismissal and/or perjury prosecutions.

Such uncertainty plainly fails to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know "where this new standard of guilt would draw the line between the allowable and the forbidden . . ." *Winters v. New York*, 333 U.S. 507 at 519, and *Cramp v. Florida*, 368 U.S. 278.

IV.

Historically, test oaths have been stricken by this Court as Bills of Attainder. *Cummings v. Missouri*, 71 U.S. (4

Wall.) 277. The test oaths involved here are not retrospective, but current and prospective. Recently, this Court has erroneously accepted the principle that a Bill of Attainder must be retrospective, and it has erroneously abandoned its functional approach to this clause. See Comment, The Bounds of Legislative Specifications, 72 Yale Law J. 333 (1962). We submit that this Court ought to restore its historical interpretation of this clause —a broad functional approach, and that under it, the 1931 and 1955 oaths are Bills of Attainder.

V.

The Washington statutes, and their oaths, are invalid because, in most respects, upheld by the District Court, below, they deal with the field of national sedition, an area pre-empted by existing Federal legislation, *Pennsylvania v. Nelson*, 350 U.S. 497, and because they materially interfere with Federal cultural and educational exchange programs. No alien professor can reasonably be expected to execute the oaths in question. To uphold state power in this area would enable state legislatures to nullify the realization of legitimate Federal goals.

VI.

The 1931 and 1955 oath statutes establish a penalty, or forfeiture, within the scope of the Fifth Amendment's protection against self-incrimination, and, under penalties of perjury, the statutes require that an employee incriminate himself with respect to his own disloyalty; thus they violate the Fifth Amendment which, we submit, should be incorporated into the Fourteenth Amendment.

VII.

A District Court cannot properly refuse declaratory relief where several material and independent sections of the 1931 enactment are clear and unambiguous. *NAACP v. Bennett*, 360 U.S. 471 and *Harrison v. NAACP*, 360 U.S. 167. In these circumstances, it is the duty of the District Court to decide the constitutional question. *Toomer v. Witsell*, 334 U.S. 385. In no event is it proper to dismiss appellants' complaint "with prejudice."

VIII.

The oath statutes are not relevant to fitness of qualifications to teach at the University of Washington, as clearly revealed by the record showing the past administrative practice. The legislature has no power to disqualify every citizen absolutely from the profession of teaching on criteria that bear no reasonable relationship to qualifications of fitness, but it seeks to do so by the 1931 and 1955 oath statutes, and as such, the Washington legislature has transgressed the bounds of due process of the Fourteenth Amendment.

IX.

Academic freedom has two sides,—learning freedom as well as teaching freedom. *Barenblatt v. U. S.*, 360 U.S. 109 at 112. Students at the University of Washington have a substantial interest in learning freedom, and it would be materially reduced by the application of the 1931 and 1955 oaths to their professors. Fear would stalk the classroom. Thus, the four students, who are appellants here, have a vital interest in learning freedom. Their interest is substantial enough to enable them to have stand-

ing to sue, and the District Court committed error in not so holding.

ARGUMENT

I.

The 1955 Oath Statute, Determining a Class of Persons Eligible for State University Employment on the Basis of Their Speech, Association and Expression; and the 1931 Oath Statute, Requiring, *Inter Alia*, That Professors Swear to Promote Undivided Allegiance to Government, Contravene the First Amendment as Applicable to State Action Under the Fourteenth Amendment.

This case involves the effort by the Washington legislature to force appellants, and others similarly situated at the University of Washington, to abandon several of their constitutional rights as a condition of academic employment. That appellants must forego certain rights to speech, associations, publications and other activities, as a condition of University employment, was recognized by the lower court when it said that, by these oaths, appellants are "required to state that they do not now and will not in the future engage in the proscribed subversive conduct nor become or remain a member of a subversive organization as defined in the statute." (215 F. Supp. at 448.) What the lower court failed to explore and measure, but what has been discussed in this brief, is the nature and the breadth of the oath statutes, thereby identifying the type and number of cherished rights which must be abandoned. The two oath statutes impose an oath of "undivided allegiance to government"; and they define a "subversive person," "subversive organization" and "foreign subversive organization" in language which is so broad and pervasive as to encompass wholly innocent political activities

and certain other activities essential for appellants to perform as they practice their academic professions. These political and academic activities, prohibited by the 1955 and 1931 oath statutes, are fully protected by the First Amendment. Thus, the conditions that appellants must meet in order to continue in their employment at the University of Washington are those of giving up absolutely several of their First Amendment freedoms and deterring their free exercise of others.

It should be noted that this case presents issues of freedom of speech and conscience in one of their most significant and sensitive contexts—the area of academic freedom. In essence, the attempt by the Washington legislature to impose oaths upon the faculty and other employees of the University of Washington is to bring conformity to bear upon the classroom and research activities of professors, and others, who may want to discuss and research areas other than those lying within the prescribed orthodoxy of the oaths. The statutes in question deter the free exercise of many First Amendment freedoms in addition to requiring faculty members to abandon others. The statutes accomplish the deterrence by confronting non-conforming faculty members with the real possibility of perjury prosecutions, or threats of perjury prosecutions, and threats of continuing investigations of their classroom lectures and research activities in order to ferret out subversives and/or those who have falsely sworn. Such conduct on the part of a state government casts a pall of orthodoxy over a university and runs directly counter to the principles of free expression which underlie our democratic form of government and which are

embodied in the First and Fourteenth Amendments as consistently interpreted by the decision of this Court.

Nevertheless, the State of Washington demands that its otherwise fully qualified professors take thought-and-action-conforming oaths as a condition of their continued employment. Professors, under these oaths, are forbidden to discuss or to teach certain doctrines and, by "precept and example," they must promote others. The University of Washington is forbidden to employ believers in certain political or economic creeds. Thus, these enactments present great dilemmas to the academic community, for, in fact, they prevent that community from following the free ways which are at the very core of its being. If a professor abides by these enactments, then, by as much as he observes the law, he ceases being involved in a truly intellectual endeavor. If the professor disobeys these enactments and carries out his professorial calling, then, he is a lawbreaker. The First Amendment, as applicable to state action under the Fourteenth Amendment, denies a state legislature power to force an otherwise fully qualified professor to make this choice where, as this record reveals, there is no subordinating state interest.

A. The Prior Cases Decided By This Court Are Not Adverse to Appellants' Claims in the Case at Bar.

In several respects, the case at bar differs fundamentally from the past decisions of this Court. One significant distinction is that this case does not involve any inquiry, or questioning, by state officials seeking information. An honest inquiry would, of course, be a legitimate state function, calling other considerations into play. The at-

tempt by the legislature here is not one of gathing data. In this case, appellants are not asked to specify, particularize, elaborate, discuss or to present any facts or opinions. What professors and researchers are required to do, in order to qualify for continuing university employment, is to give one, and only one, answer—the right answer, and it has been prescribed by the legislature. In short, professors of researchers must agree with the majority of the legislature or lose their jobs, and suffer the taint of disloyalty.

Under penalties of perjury and/or dismissal, all professors must swear, *inter alia*, that "by precept and example" they will "promote . . . undivided allegiance to government," and that they are not, and will abstain from becoming, "subversive persons," or members of "foreign subversive organizations," or "subversive organizations," or of the communist party. All professors must either hold, and continue to hold, to these legislatively prescribed views, an official orthodoxy, and continue to abstain from the legislatively prohibited speech and associations, or they may "seek private employment." (*Nostrand v. Little*, 58 Wn.(2d) 111 at 131.) If professors should refuse to swear, as set forth above, then, "their refusal to do so renders them ineligible for further employment," (*Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477, also see p. 483.) "If he declines to sign, the employee is subject to immediate discharge." (*Nostrand v. Little*, 58 Wn.(2d) 111 at 125.) There is no possibility of a hearing where any reason for not executing the 1931 or 1955 oaths could be accepted as an excuse or justification for such non-

execution. (See, *infra*, Argument, Part II.) Like *Cramp v. Florida*, *infra*, refusal to execute these oaths results in an employee's immediate discharge.

It is clear that by the 1931 and 1955 oath statutes, the legislature is not seeking to be enlightened, nor is it interested in gathering information. What it wants is the right answer, which is to say, that the legislature is not looking for legislative data from appellants. Thus, many of the prior decisions of this Court do not control the adjudication of this case because, in those past cases, the legislature, or state official, was appropriately seeking information, and it was blocked by a refusal to answer. In those cases, the legislature was not trying to coerce one and only one answer which it had earlier prescribed to be the only acceptable one, and, furthermore, a meaningful hearing was afforded in each instance. Several such cases, heavily relied upon by appellees, are, *Adler v. Bd. of Ed.*, 342 U.S. 485; *Barenblatt v. U. S.* 360 U.S. 109; *Beilan v. Bd. of Ed.* 357 U.S. 399; *Braden v. U. S.*, 365 U.S. 431; *Cohen v. Hurley*, 366 U.S. 117; *Communist Party v. S. A. C.*, 367 U.S. 1; *In re Anastaplo*, 366 U.S. 82; *Konigsberg v. California*, 353 U.S. 252 and 366 U.S. 36; *Lerner v. Casey*, 357 U.S. 468; *Nelson v. Los Angeles*, 362 U.S. 1, and *Wilkinson v. U. S.* 365 U.S. 399.

The case at bar is fundamentally different from *Garner v. Bd. of Public Wks.*, 341 U.S. 716, greatly relied upon by appellees. This Court's opinion in *Garner* discussed only the Bill of Attainder and ex post facto points. It did not explore, nor discuss, the First Amendment issues raised in *Garner*, nor are they similar to those in the case

at bar. This Court disposed of the First Amendment contentions in *Garner* by simply citing *United Public Workers v. Mitchell*, 330 U.S. 75 (*Garner* at p. 721.) Although nothing in *Mitchell* justifies the restrictions on speech and association made in this case, the citation of *Mitchell* may well have been appropriate in the context of the *Garner* case because the two cases presented identical interests, which differ from the interests presented here. *Garner* dealt with a city's interest in preserving the integrity of its municipal civil service and *Mitchell* with the federal government's interest in the integrity of the federal civil service. Thus, at most, it can be seen that this Court had adjudicated only the interests of a state with regard to the integrity of its civil service employees.

This Court assumed that knowledge was part of the *Garner* oath, and it did not consider, nor adjudicate, whether the mere presence of knowledge alone necessarily insulates every oath from the possibility of infringing upon First Amendment freedoms. Subsequent cases indicate that knowledge alone is not sufficient. *Speiser v. Randall*, 357 U.S. 513; *Shelton v. Tucker*, 364 U.S. 479, and *Cramp v. Florida*, 368 U.S. 278.

Garner did not consider the interests of a state, nor those of a professor, nor those of society in academic freedom on a university campus. *Garner* does not speak to this set of relationships. That the interests of both a state and an employee in the municipal civil service differ materially and fundamentally from a state's interest in its professorial faculty and a professor's interest in academic employment cannot be denied. This Court has

considered this set of relationships in a more recent case, *Sweezy v. New Hampshire*, 354 U.S. 234, and it balanced the interests contra to *Garner*, indicating that this Court has drawn a line between these two different sets of interests. Also, in *Speiser v. Randall*, 357 U.S. 513 at 527, this Court distinguished the *Gerende*, see *infra*, and *Garner* cases on the ground that in those cases there was "... no attempt directly to control speech but rather to protect from an evil shown to be grave, some interest clearly within the sphere of governmental concern." An analysis of the 1931 and 1955 oaths in the case at bar reveals that the Washington legislature has attempted to control the speech of professors.

Whatever interest a state may have in minimally restricting the speech and association of its municipal civil servants as a condition of their employment *(Garner)*, that interest is, obviously, not of the same order as is its interest with respect to the speech and associations of university faculty members. To the contrary, the legitimate interests of a state in a free society, and the interests of a professor at a free university, within that society, are not in conflict, but in harmony; they unite to further all the freedoms of speech, association and peaceable assembly of all faculty members, thereby encouraging the pursuit of truth and the acquisition of knowledge for the entire community. See Machlup, On Some Misconceptions Concerning Academic Freedom, 41 A.A.U.P. Bull. 753 (1955); Ingraham, Academic Freedom, 101 Proceedings of the Am. Phil. Soc'y 441 (1957); and Symposium, Academic Freedom, Law and Contemp. Problems 431-671 (1963).

The approach of this Court when adjudicating issues involving the First Amendment, as well as other constitutional issues, is circumspect, and its adjudication goes forth carefully on a case by case analysis. *"In each case* courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger." *Dennis v. U. S.*, 341 U.S. 494 at 510. (Emphasis supplied.) In every case, final decision "is a question of proximity and degree." *Schenck v. United States*, 249 U.S. 47 at 52. Carte blanche citation of cases, without discriminating analysis, is not enough. *Garner v. Bd. of Pub. Wks., supra*, does not control the issues in the case at bar. (For further discussion of *Garner* and *Adler v. Bd. of Ed., infra*, see Morris, Academic Freedom and Loyalty Oaths, 28 Law and Contemp. Probs. 486, 502-510.)

There is need to locate the point at which the First Amendment operates as a limitation on state power to require oaths as a condition of state employment. This question is cleanly brought to issue in this case which unequivocally pits the First Amendment claims to freedom of religion, free speech and private association, including academic freedom, by faculty members and other employees, at the University of Washington, against the requirement that, as a condition of their continued employment, all members of the teaching faculty must execute two required oaths, and that all other employees must execute one of the two oaths.

This Court's disposition in *Gerende v. Bd. of Supervisors*, 341 U.S. 56, does not decide this appeal because

Gerende did not present the issues which are presented by this case. In *Gerende* this Court affirmed the judgment of the Maryland Court of Appeals on the understanding that "a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*', and that he is not knowingly a member of an organization engaged in such an attempt." This Court did not have before it the much broader and pervasive Section 15 of Maryland's Ober Act which defined a "subversive person" in language identical to that involved in this case. The Maryland Court had held that Section 15 did not apply to Gerende, *Shub v. Simpson*, 76 A.(2d) 332, at 341, thus the questions presented in this case have not been prejudiced by *Gerende*.

Nor do the employee dismissal cases foreclose the issues presented here. In *Beilan v. Bd. of Ed.*, 357 U.S. 399, a public school teacher was discharged for "incompetency" under § 1122 of the Pennsylvania Public School Code, because of his refusal, continued after a warning that failure to answer might lead to his dismissal, and after a hearing, to answer a question of his superintendent as to his membership in the Communist Political Association. This section of the Pennsylvania Code was not in issue in *Beilan*, whereas the Washington statutes are in issue in this case. But, more importantly, the procedures in *Beilan* were designed for identification and informational purposes only and not for exclusionary and dismissal purposes as are the Washington oaths. Thus, in *Beilan* the question before this Court was whether *Beilan* could be discharged for

blocking a legitimate inquiry of the state for identification and informational purposes. There is nothing in *Beilan* that holds that a state may discharge a person because he reveals that he is a member of the Communist Political Association. However, the case at bar does not present appellants with the middle ground of *Beilan* where they might give the demanded information and retain employment. A person must execute the oaths, questioned in this case, in order to be eligible for state employment; thus, the statutes here function to exclude employees from continued state employment, and they do so without a meaningful hearing, present in *Beilan*, where appellants might explain or justify their refusal to execute the oaths. Furthermore, the oaths here present a broadside attack on First Amendment liberties, going well beyond the simple question put to *Beilan* (see infra). Thus, in their breadth and in their broadside manner of infringement, the oaths demanded of appellants are controlled by the decision in *Shelton v. Tucker*, 364 U.S. 479, a case not decided at the time of the *Beilan* decision. Also, *Beilan* involved a selective and less drastic approach to the problem than do the oaths in this case. For these same reasons *Lerner v. Casey*, 357 U.S. 468, and *Nelson v. Los Angeles*, 362 U.S. 1, do not prejudice the questions presented in this appeal.

Other cases, such as *Konigsberg v. California*, 353 U.S. 252 and 366 U. S. 36, and *In re Anastaplo*, 366 U.S. 82, do not decide the issues presented in this case for many of the same reasons discussed above with reference to *Beilan*. But, in addition to those reasons, there is another. This Court has clearly indicated that there is a difference be-

tween a state offering a "privilege" and a state legislating conditions of state employment. *Konigsberg* and *Anastaplo* were decided on the theory that bar admission was a privilege:

> "Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications . . ." (*In re Anastaplo*, 366 U.S. 82 at 90.)

This Court, subsequent to *Adler v. Bd. of Ed.*, 342 U.S. 485, has clearly indicated that state employment does not fall into the "privilege" classification. *Wieman v. Updegraff*, 344 U.S. 183 at 192; *Torcaso v. Watkins*, 367 U.S. 488 at 495-96, and *Cramp v. Florida*, 368 U.S. 278.

However, as noted above, *Adler, supra*, was decided, in part, on the now discredited "privilege-of-state-employment" reasoning, and hence, either it loses much of its vitality, or the conflict in the opinions of this Court on this point indicate that *Adler* should now be expressly overruled. Furthermore, *Adler* was decided before this Court fully recognized constitutional protection for the right to private association, *NAACP v. Alabama*, 357 U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516, relied upon here by appellants, thus *Adler's* holding that unexplained membership in a "subversive organization" might qualify as grounds for the dismissal of a teacher has been seriously impaired by this Court's cases subsequent to *Adler*.

In addition, *Adler's* holding does not decide this appeal because *Adler* was decided within the framework of viewing the state as a seeker of information, i.e., identification, a legitimate state purpose, and provision for a mean-

ingful hearing was afforded to the teachers. As pointed out above, Washington's oaths do not serve the purpose of information, i.e., identification, but rather, they are exclusionary, locating a class of persons who are eligible for employment, or continued employment, and locating them on the basis of their beliefs, speech and associations. No meaningful hearing is afforded in the case at bar. Finally, *Adler's* rationale and holding have been seriously undermined by two subsequent decisions of this Court; *Wieman v. Updegraff*, 344 U.S. 183, and *Speiser v. Randall*, 357 U.S. 513, and by the fact that *Adler* followed precedent *(Garner)* which was not in point. *Adler* decided that unexplained membership in a "subversive organization" might qualify a teacher for dismissal. This means that the teacher is considered as being a member of a subversive organization, and if he refuses to explain his membership, the question was whether he can be discharged. In *Adler*, the teacher was held to be a member of the organization, and, at page 492, this Court cited *Garner v. Bd. of Public Works, supra*, for its precedent on this point. However, *Garner*, at page 720, expressly said:

> "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation [in the Communist Party, U.S.A.] justifies his discharge."

Thus, it is clear then, in another respect *Adler* is defective, and cannot be relied upon to govern the issues presented in this case. For further discussion of *Garner, Adler* and other cases, in an academic freedom context, see, Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemp. Probs. 487, 502-510 (1963).

The prior cases decided by this Court are not adverse to appellants. The past precedents do not squarely decide the issues presented by this case — as admitted by appellees in their jurisdictional statement, submitted earlier in this case, and which has been filed with this Court, see p. 22: "This Court has decided no one case involving every issue . . . presented [in the case at bar] . . .". Therefore, an examination of appellants' constitutional rights, their abridgments and deterrence by the 1931 and 1955 oath statutes, and the state's interest in so doing are in order.

B. The 1955 and 1931 Oath Statutes, and Their Oaths, Materially Interfere With Appellants' Free Exercise of First Amendment Freedoms of Expression and Conscience.

The Rights Involved.

Previous decisions of this Court establish beyond all doubt that all the freedoms set forth in the First Amendment of the United States Constitution are fully protected from infringement by state action by the Fourteenth Amendment. (*Thomas v. Collins*, 323 U.S. 516, 530 (speech); *DeJonge v. Oregon*, 299 U.S. 353, 364 (assembly); *Lovell v. Griffin*, 303 U.S. 444, 450 (speech and press); *Staub v. Baxley*, 355 U.S. 313, 321 (speech); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (press); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (religion); *Shelton v. Tucker*, 364 U.S. 479, 486, 488 (association); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (association); *Edwards v. South Carolina*, 372 U.S. 229 (speech, assembly and petition for redress of grievances).) Appellants invoke these constitutional rights in support of their positions herein; and particularly they invoke their

right to stand silent, *West Virginia v. Barnette*, 319 U.S. 624, and their right to academic freedom, *Sweezy v. New Hampshire*, 354 U.S. 234. (See Symposium, Academic Freedom, 28 Law and Contemporary Problems 431-671 1963).)

The areas of peaceful political expression and association have long been held to come within the protection of the First Amendment as it is enforced against state action through the Fourteenth.

This protection extends to expression of exhortation as well as to that of speech which is peaceful or academic, and which is of a less volatile nature. *Cantwell v. Connecticut*, 310 U.S. 296; *Terminiello v. Chicago*, 337 U.S. 1; *DeJonge v. Oregon*, 299 U.S. 353; *Dennis v. U. S.*, 341 U.S. 494, 501-2; *Yates v. U. S.*, 354 U.S. 298.

Indeed, peaceful association, peaceful discussion and peaceful worship, or freedom from compulsory worship, constitute the very purposes of the First Amendment. (See, Emerson, Toward A General Theory Of The First Amendment, 72 Yale L. J. 877.) And those purposes of the First Amendment have been awarded a preferred position in our constitutional scheme of things. This part of the First Amendment *does* stand in a preferred position. *Speiser v. Randall*, 357 U.S. 513; *Thomas v. Collins*, 323 U.S. 516, 527, note 12, 530; *Murdock v. Pennsylvania*, 319 U.S. 105; McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182 (1959); Cahn, The Firstness of the First Amendment, 65 Yale L. J. 464 (1956).

Given this scope and importance of free expression and

conscience under the First Amendment, it is little wonder then that academic liberty, its necessary associations, and the peaceful discussion and exploration of doctrines, even doctrines which themselves are unorthodox, Communist, Marxist or otherwise, are fully protected and come well within the ambit of constitutional protection against invasion by legislation of the state. *Sweezy v. New Hampshire*, 354 U.S. 234; *Dennis v. United States*, 341 U.S. 494, 501-2; *Yates v. United States*, 354 U.S. 298.

The very heart of this area is academic liberty which is invoked by plaintiffs here.

> "There is no freedom without choice, and there is no choice without knowledge — or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind or absorb and to beget . . . At the root of all liberty is the liberty to know." Cardozo, Paradoxes of Legal Science (1928) p. 4.

This Court has indicated that the area of academic liberty is of special concern: "When academic teaching — freedom and its corollary learning — freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." *Barenblatt v. United States*, 360 U.S. 109, 112. (See also (a) Hutchins, The Meaning and Significance of Academic Freedom, 300 The Annals 72 (1955); (b) Taylor, The Dismissal of Fifth Amendment Professors, 300 The Annals 79 (1955); (c) Barth, The Loyalty of Free Men, ch. 9 (1951); (d) Academic Freedom and Tenure in the Quest for National Security, 42 A.A.U.P. Bulletin 49 (1956);

(e) John F. Kennedy, Let's Get Rid of College Loyalty Oaths! *Coronet*, April, 1960): And, of course, if a state legislature has no power to investigate within this area, it certainly has no power to legislate over it.

> "There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication, *particularly in the academic community.*" *Sweezy v. New Hampshire*, 354 U.S. 234, 245. (Emphasis supplied)

> "Probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization." Mr. Justice Frankfurter in *American Communication Assoc. v. Douds*, 339 U.S. 382 (concurring opinion).

More emphatically, in the *Sweezy* case, four mmbers of this Court held the view that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (*Sweezy v. New Hampshire*, 354 U.S. 234, 250.)

The *Sweezy* case clearly recognizes, and gives protection to, academic liberty which is at the core of the First Amendment. It carves out of the First Amendment a preferred position for intellectual liberty, the essence of which is academic freedom. Six justices were in agreement on the following principle:

> "... petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated. . . . We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." (*Sweezy*, at page 250.)

The above statement appears in an opinion by the Chief Justice writing for four members of this Court in the *Sweezy* case.

The opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan joined, concurred in the result of the *Sweezy* case. But these two Justices went farther and grounded their views squarely upon the First Amendment. Under it they held that "the dependence of a free society (is) on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." 354 U.S. 234, 262.

Taken together, the opinions of this Court in the *Sweezy* case clearly establish that academic freedom and intel-

lectual liberty fully receive constitutional protection under the First Amendment as it is incorporated into the Fourteenth. This Court, itself, has recognized and officially endorsed, this view of the *Sweezy* case in *Barenblatt v. United States*, 360 U.S. 109, 129. The merit of intellectual liberties again was recognized in *Shelton v. Tucker*, 364 U.S. 479, 484, 485. There, this Court condemned a state statute as a prior restraint and spoke of it as invading a teacher's "rights to personal, associational and *academic liberty*, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action." (Emphasis supplied.)

There can be no doubt that academic freedom and intellectual liberty are constitutional rights of the University faculty members in this case and that they are fully protected from state infringement by the First and Fourteenth Amendments. The right to academic freedom is invoked here, and it is sought to be protected from being invaded by the 1931 and 1955 oath statutes here in question. We believe that the District Court, below, committed reversible error when it refused to recognize, and protect, this constitutional right of appellants, although these matters were fully briefed and argued. For further discussion see: Murphy, Academic Freedom—An Emerging Constitutional Right, 28 Law & Contemp. Probs. 447; Cowan, Interference With Academic Freedom: The Pre-Natal History of a Tort, 4 Wayne Law Rev. 205; Chapter V, Volume 2, Emerson and Haber, Political and Civil Rights in the United States (1958); and *Wieman v. Updegraf*, 344 U.S. 183 (concurring opinion).

The Constitutional Rights That Must Be Abandoned And/Or Deterred by the 1931 and 1955 Oaths If They are Applied to All State Employees, Including Professors

The extent of the invasions of liberty can be measured by the sweep of the various statutes which serve to define the oaths.

The Unconstitutional Breadth of the 1955 Disclaimer Oath

It is important to remember that the Washington State Supreme Court has carefully reviewed the sweeping breadth of the statutes defining the 1955 disclaimer oath. In an opinion, discussing *Shelton v. Tucker*, 364 U.S. 479, and other cases, the Washington Supreme Court declared that: "Unlike the Arkansas statute, our act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130. The opinion of the District Court, below, considered *Sweezy v. New Hampshire*, *supra*, *Shelton v. Tucker*, *supra*, and *Cramp v. Florida*, 368 U.S. 278, and other cases. The District Court agreed with the Washington Court, holding:

> "Recent cases have made clear that a substantial invasion of such rights may not be justified by reliance on a state's right to inquire into the fitness and competency of teachers. But we find no such invasion of constitutional rights by the statute and oath in question here. A careful consideration of the language of the oath confirms the impression left by a cursory reading: namely, that the oath does not require any statement as to political, religious, economic or social beliefs of the person subscribing thereto, nor does it require him to refrain from membership in any kind of association whatever, *except* those associations

which have an aim or purpose to overthrow, destroy or alter the constitution and government of the state or nation by revolution, force, or violence."

"Foreign Subversive Organization"

That the District Court is flatly in error and misunderstands the breadth of the 1955 disclaimer oath is clearly demonstrated by reading the statutory definition of "Foreign Subversive Organization" which in no way is qualified and limited in its application only to those associations seeking change in government *by revolution, force, or violence*. The "foreign subversive organization" section, in its permutations and combinations, confronts an affiant with 16,200 questions, each of which is required by statute, and which an affiant must disclaim or be ineligible for state employment. There is no middle ground. Not one question is limited to membership in associations willing to use force or violence or engage in revolution as a means for social or political change (See Exhibit 14, pages 47 to 52).

One example will suffice: "Foreign subversive organization means any organization directed . . . indirectly by a foreign government . . . a purpose of which is to advocate . . . activities intended to . . . assist in . . . the alteration of the constitutional form of government of the United States or the State of Washington . . . and to establish in place thereof any form of government the direction and control of which is to be vested in . . . any foreign government, organization or individual." In application then, if the government of Australia were to advocate that we in America alter our constitution, by amendment, to vest

direction and control over nuclear weapons, and other military decisions, in the United Nations, then, according to this definition, each citizen of Australia, Professor Kenneth E. Read, appellant here (R. 199-202), would be a member of a "foreign subversive organization" and ineligible for professorial employment at the University of Washington.

Another, more immediate, type of problem suggests itself. Professor Rhoads Murphey is Professor of Geography and a Member of the Far Eastern and Russian Institute at the University of Washington (R. 202). He teaches courses requiring original and direct study of Chinese Communism, and he is editor of the Journal of Asian Studies published by the Association For Asian Studies (R. 202). As such, Professor Murphey represents this Association at the International Congress of Orientalists of which he is a member (R. 203). At these meetings Professor Murphey associates with, and, as editor, he advances the causes of the other members of the organization, many of whom are communists from China and/or the Soviet Union (R. 203). Given the expansive definition of "foreign subversive organization," counsel cannot advise Professor Murphey that he definitely is not a member of a "foreign subversive organization." Thus Professor Murphey is faced with a dilemma. To be safe he must withdraw from these types of organizations and activities, thereby depriving himself of speech, association and publication essential to the practice of his academic profession; or Professor Murphey must execute the oaths and continue these types of associations, thereby risking dismissal, and perjury prosecutions for having been a member of

a "foreign subversive organization." He refuses to execute the oaths, and whether Professor Murphey "remain[s] at the University of Washington will depend upon the outcome of this suit" (R. 202).

Not only do the 1955 and 1931 oaths require Professor Murphey to conform his out-of-the-classroom activities of speech, association and publication to what a majority of the Washington legislature believes to be appropriate, but the oaths also require that Professor Murphey control his lectures and activities inside the classroom to what a majority of the Washington legislature believes to be proper and correct, irrespective of their intrinsic intellectual merits.

> "If I signed the oath, I would not feel that I could discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses which I teach and of the field in which I work. It is not possible, for example, to deal adequately with communism in China or with important aspects of the political and economic systems in India and southeast Asia without discussing controversial matters which I would not feel free to attempt if I signed the oath. The policy of the United States in those parts of the world and the administration of United States aid are also issues which require free discussion in the courses which I offer and which I would feel constrained from discussing freely. United States non-recognition of Communist China, the United States role in the Chinese civil war of 1947-49, the United States position on Formosa, United States military aid to Pakistan and Viet Nam, and United States policy toward India, including its policy on economic aid to India; may all legitimately be criticized and should be subjected to free discussion in any course dealing with the modern period in

> Asia. If the oath were imposed upon me, I would not feel that I could teach honestly and effectively. Similarly, in the course, Introduction to Geography, which I also offer from time to time, it is appropriate and necessary for me to discuss, among other things, United States policy toward the use of American resources, which may also legitimately be subjected to criticism, the role of superabundant natural resources rather than of a particular economic or political system in accounting for the development of a high standard of living in the United States, the virtues of the T.V.A. as a method of resource management, and the regrettable absence or weakness of planning in the growth of American cities. These and other controversial points are set forth in detail in Chapter 36 of my textbook, An Introduction to Geography, Rand McNally, 1961. If I signed the oath, I would not feel that I could discuss them, or encourage students to discuss them, and hence would not feel that I could in honesty teach." (R. 204-5).

Nor can an anthropologist, Professor C. A. Valentine, be expected to conform to the requirements of the 1931 and 1955 oaths and have fidelity to his necessary teaching and research activities (R. 196-9).

The expansive and unqualified statutory definition of "foreign subversive organization" has confronted Professor Murphey with a Hobson's choice. The dilemma is not unique with him. To the contrary, a large number of faculty members at the University of Washington are caught in the vise. For example, counsel cannot advise Professor Z. W. Birnbaum that he definitely is not a member of a foreign subversive organization, as defined by this statute and applied to Professor Birnbaum's Academic associations (R. 49-59). Nor can counsel give such assurances to Professors Wilcox (R. 191), Dawson (R. 192),

Fleagle (R. 192), English (R. 192-3), and Keller (R. 193).

But, if upheld, these oaths have another implication. The "foreign subversive organization" section of the 1951 Act, and the remaining definitional sections of the 1951 Act, included into 1955 oath, and the 1931 oath, all transgress, and will nullify, the policy of Congress which enables the President to provide, by grant, contract, or otherwise, for:

> "(1) *educational exchanges* (i) by financing studies, research, *instruction*, and other educational activities—
>
> "(A) . . .
>
> "(B) of or for *citizens and nationals of foreign countries in American schools and institutions of learning* located in or outside the United States;
>
> "and (ii) by financing visits and interchanges between the United States and other countries of students, trainees, *teachers, instructors and professors;*" (22 U.S.C. §2452) (emphasis supplied).

Professors who are citizens or nationals of foreign countries, e.g., Soviet Union, Poland, etc., will be disallowed, because they must execute the oaths before coming to the University of Washington, and, perhaps, to other state universities under the federal program outlined above. Nevertheless, the University of Washington, currently has, as do all great universities today, an extensive program whereby it invites foreign professors to join its faculty. This includes "visiting professors from communist countries" (R. 61, 191, 297). It is inconceivable that a professor from a communist country can, and will, honestly swear that he is not a member of a "foreign subversive

organization," or that "by precept and example" he will promote "undivided allegiance to the government of the United States." Yet, regardless of the past practice, the 1955 and 1961 oaths, as of May, 1962, have actually been demanded from aliens and citizens as conditions of University employment (R. 159). For further discussion see, *infra*, Part V on pre-emption.

"Subversive Person"

"Subversive persons" are defined by many gradations of speech and associations. But, as this Court pointed out in *Sweezy v. New Hampshire*, 354 U.S. 234 at 246, when it had statutes before it identical in wording with those in this case: this Court's "interest is in the minimal requirements of that definition since they will outline its reach." Accordingly, a "subversive person" is "any person who . . . teaches by any means any person to . . . aid in the commission of any act intended to . . . assist in the . . . alteration of the constitutional form of government of the United States, or of the State of Washington . . . by revolution, force or violence;" Thus, a professor who teaches his students "by any means" that the American Revolution was justified under the circumstances set forth in the Declaration of Independence, and that revolution would again be justified if American government degenerated to those conditions, would, by this definition, be a "subversive person." The "subversive person" section, in its permutations and combinations, presents 34,290 separate questions to an affiant, which he must disclaim or be ineligible for continued employment (Ex. 14, pp. 53-57).

Each question reveals the potential sweep of the stat-

utory definition of a "subversive person" and that it extends to speech and conduct which is only remotely related to actual subversion. When judging this section, this Court's comments on an identically worded statute were not followed by the District Court:

> "The possible remoteness from armed insurrection of conduct that could satisfy these criteria is obvious from the language. The statute goes well beyond those who are engaged in efforts designed to alter the form of the government by force or violence. The statute declares, in effect, that the assistant of an assistant is caught up in the definition." (*Sweezy v. New Hampshire*, 354 U.S. 234 at 246.)

The statutory declaration that the assistant of an assistant is a "subversive person" destroys all possibilities of meaningful academic collaboration between members of the University of Washington faculty and scholars from hostile and/or communist countries. Appellant, Boris Jacobsohn, professor of theoretical physics, has recently spent a year at Bern, Switzerland, co-authoring two original articles on nuclear physics with a Soviet scientist, R. M. Ryndin (R. 188). Professor Jacobsohn must continue in these types of collaborative research and publication efforts for they are "essential to the proper discharge of his duties as a professor of theoretical physics at the University of Washington." (R. 188-9.) But counsel cannot advise Professor Jacobsohn that he is outside the sweep of the statutory definition of a "subversive person." Counsel cannot assure Professor Jacobsohn, if he were to continue this type of research and scholarly activity, that he will not "by any means" intentionally have aided "in the commission of any act" assisting in the "alteration of the

constitutional form of government" by revolution, force or violence. Thus, the price Professor Jacobsohn must pay for continued state employment is that of giving up research and publication activities essential to his calling as a scholar; activities which are fully protected by the First Amendment.

This dilemma, caused by the oaths, is not unique to Professor Jacobsohn. In 1958, Professor Isaac Halpern of the Department of Physics (R. 152) jointly published an original and pathbreaking article on certain aspects of mathematical theory regarding angular distributions in nuclear fission. Professor Halpern's collaborator was V. M. Strutinski of the Institute of Atomic Energy of the Academy of Sciences of the U. S. S. R. Mathematically, they determined the directions in which the various fragments of a nucleus will diffuse whenever it is split. See I. Halpern and V. M. Strutinski, Angular Distributions In Particle-Induced Fission At Medium Energies, 15 Proceedings, The Second United States International Conference On Peaceful Uses Of Atomic Energy, 408-17 (U. N., Geneva, 1958). The front page of the European edition of the *New York Herald Tribune* for September 5, 1958, reported on this article as follows: "For the first time in history an American and a Russian have worked together on a problem in splitting the uranium atom. Their results . . . were said to have significantly advanced the knowledge of the process that yields atomic energy." As a physicist, Professor Halpern must continue these types of academic associations and publications, but he will have to forego them if the oaths are applied to him. Thus, it is unreasonable and unconstitutional for the Washington

legislature to demand, as a condition of professional employment at the University of Washington, that Professor Halpern swear that he will never "teach by any means any person to . . . aid in the commission of any act intended to . . . assist in the . . . alteration of the constitutional form of government . . . by revolution, force or violence." ("Subversive Person" definition.)

There is no doubt that appellant Philip E. Wilcox, like many other faculty members at the University of Washington, has taught, and has intended to give aid and assistance, as part of his academic duties, to members of the Soviet Union who may very well desire to "alter . . . the constitutional form of government of the United States . . . by revolution, force or violence." (R. 191). The same is true of Professors Fleagle (R. 192), Keller (R. 193), and Birnbaum (R. 52-9).

If appellants are to continue the types of associations, assistance and teachings necessary for fruitful academic work, counsel cannot advise them definitely that they will not be caught up in the assistant-to-the-assistant definition of a "subversive person," and become ineligible for further employment and a target for a perjury prosecution. Thus, they too, are faced with a Hobson's choice because of the 1955 oath requirements. They must either "play it safe," that is, abandon their constitutional rights, or continue their scholarly pursuits at the risks of dismissal and/or perjury prosecutions.

"*Subversive Organization*"

Washington's 1955 oath's final definition, that of "subversive organization," is sweepingly broad. A "subversive

organization" is "any organization . . . a purpose of which is to . . . teach activities intended . . . to assist in the . . . alteration of . . . government . . . by revolution, force and violence." Again, an assistant to an assistant is caught up by this definition, and it matters not whether the group be temporary or permanent. Suppose that a group were in existence only for the purpose of advancing all views on every subject, including, as one of its many views that of abetting, advising, or teaching, by any means, activities intended to assist another group in its attempts, or in its assistance to others who desire to alter government in the prohibited manner. Knowing membership in this first group is enough to qualify one as "subversive"; it need not be active membership. It is not possible under this statute, for a group member who is opposed to one of the group's purposes, say the one prohibited by this Washington statute, to remain a member of the group and to become, or remain, a state employee, even though he dissents from that particular purpose, is not active, and believes that the group as a whole is worthwhile. This is guilt by association.

In many cases—which were rejected by the District Court—this Court has held that government has no power to prohibit or punish mere knowing membership in the Communist Party, if it is not "active." Otherwise, the principle of guilt by association, foreign to our law, would be approved. *Scales v. U.S.*, 367 U.S. 203; *Noto v. U.S.*, 367 U.S. 290; *Yates v. U.S.*, 354 U.S. 298, and *Dennis v. U.S.*, 341 U.S. 494. It is clear that Washington has no power to incorporate the principle of guilt by association

into her employment policies. It surely cannot go beyond inactive, but knowing membership in the Communist Party, if that far, and prohibit absolutely all state employment to those persons who are members of "subversive organizations." Furthermore, this Court has held that the First Amendment grants to every citizen the constitutional right to advocate violent overthrow of government so long as he does not incite others to unlawful action:

> "We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *(Noto v. U.S.*, 367 U.S. 290 at 297, 298).

Yet, it is exactly these, and other constitutional rights to liberty and association, that Washington insists each of its employees must give up as a condition precedent to their qualifying for employment. This Court has held these rights to be immune from the indiscriminate reach of state power.

It is no answer to argue that state employment is a "privilege" and not a "right," and then infer that the infringements here are permissible because they infringe upon no rights. This Court has set that issue at rest, holding:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *(Wieman v. Updegraff*, 344 U.S. 183 at 192; expressly

confirmed in *Torcaso v. Watkins*, 367 U.S. 488, 495-96, and in *Cramp v. Florida*, 368 U.S. 278.)

We submit that the unlimited and indiscriminate sweep of the statutes defining the 1955 disclaimer oath bring them within the ban of this Court's prior cases and that the statutes' comprehensive interferences with freedom of speech and association go far beyond what might be justified in the exercise of the state's legitimate conditions of employment for its professors and other employees.

The Unconstitutional Breadth of the 1931 Oath of Undivided Allegiance

The 1931 oath of undivided allegiance to government is likewise a broad intrusion of state power into areas forbidden the state by the First and Fourteenth Amendments. The sweep of this oath is measured by its requirement that every professor must solemnly swear that he "will by precept and example promote":

1. "respect for the flag and"

2. "the institutions of the United States of America and the State of Washington,"

3. "reverence for law and order" and

4. "undivided allegiance to the government of the United States."

This oath is an annual oath applying not only to certification and to every new teaching contract, but also to the renewal of every teaching contract in the State of Washington. Its purpose is clearly that of promoting patriotism, a purpose heretofore held insufficient by this Court

as a justification for abridging freedom of speech, association, and conscience. *West Va. v. Barnette*, 319 U.S. 624. The oath seeks to achieve its goal of patriotism by requiring, among other things, that a professor give up his independence of mind and conscience and swear that he will promote by precept and example undivided allegiance to the government of the United States. Thus, this oath strikes at the very heart of free conscience, speech, and association, and seeks to impose upon all professors a thought-stifling and action-conforming nationalistic orthodoxy contrary to the clear mandate of this Court that:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Va. v. Barnette*, 319 U.S. 624 at 642, and see *Engel v. Vitale*, 370 U.S. 421 at 425, where this Court denied that government had constitutional power to compose prayers and require supplication to them as part of a governmental program to further all religious beliefs.)

Yet, it is precisely these forbidden areas that the Washington legislature seeks to reach. It seeks to force professors by word (precept) and act (example) to confess their faith in an orthodox nationalism (undivided allegiance to the government of the United States),—all to the abridgement and detriment of the professors' constitutionally protected freedom of religion, conscience, speech and association. Of the unconstitutional invasions

into these areas there can be no doubt. Also, there can be no doubt of the consequences if a professor fails to execute the 1931 oath, because the statute provides that if "any person or persons . . . fail or refuse to execute the oath . . . any contract executed or renewed, or license issued in violation hereof shall be and is hereby declared to be null and void." The statute operates summarily.

Although alleging that it would not do so, the District Court did pass upon the constitutionality of the 1931 statute, at least insofar as it involves freedom of speech, association, and conscience. The District Court held: "Insofar as the arguments heretofore considered with respect to the loyalty oath [the 1955 disclaimer oath] are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the District Court committed error and that under our constitutional system, the coercion of undivided allegiance to government is unknown. "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world have kept the hangman busy." (*Cramer v. U.S.*, 325 U.S. 1 at 21.)

The American tradition is eternally hostile toward every form of tyranny over the mind of man. In the realm of reason and conscience (*West Va. v. Barnette, supra*) as well as in the realm of conduct (*Chambers v. Florida*, 309 U.S. 227), the forced extraction of men's beliefs or acts

are incompatible with a free society. Those who equate loyalty with conformity misconceive the American tradition. Under the pressure of such legislative misconceptions, professors, in order to exercise their profession, are, in effect, compelled to hold opinions on academic, political and social matters as they have been prescribed by the Washington State legislature. To uphold this power would go too far. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." (Chafee, Z., Freedom of Speech 466 (1941)).

The free exercise of constitutionally protected freedoms of religion, speech, private association and academic freedom of appellants, and others similarly situated, will be substantially interfered with, and materially abridged, by the statutory requirements that appellants, and others similarly situated, execute the oaths as a condition of continued employment. This invasion of protected liberties is an uncontested and admitted fact:

> "Unless defendants are restrained from enforcing provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants), and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (R. 174.)

The undoubted encroachment upon appellants' free exercise of the above liberties is further corroborated by the statements of Professors Holt (R. 195-6), Valentine

(R. 197), Read (R. 200-1), Murphey (R. 204-5), Rader (R. 209), Dietrichson (R. 215), and Wilcox, Dawson, Fleagle, English and Keller (R. 191-3), plus the deposition of Professor Z. W. Birnbaum. Of the infringement upon and deterrence of, protected liberties there can be no question.

Indeed, the Opinion of the Three-Judge District Court clearly proceeds from the assumption that the oaths will invade and deter the otherwise free exercise of appellants' First Amendment freedoms. However, without exploring the breadth of the definitions, the lower court ruled that the interferences were justifiable:

> "... plaintiffs assert that the requirement that they sign the form of oath presented to them, in the language in which it is couched, unjustifiably invades their First Amendment freedoms of speech, belief and association, and will tend to discourage the exercise of constitutionally-protected rights of association and exchange of ideas, ... impairing their performance of their academic function. Such rights, whether in relation to academic liberty or otherwise, are to be accorded a high degree of constitutional protection, but they are not 'absolutes.' It is sometimes necessary to reconcile these constitutional protections against the exercise of valid governmental powers by a 'balancing' of the interests involved.[17]
>
> * * *
>
> "If denial of state employment to a 'subversive' person, as defined in the statute, constitutes any invasion of constitutional rights of speech and association, the restriction certainly goes no further than may be justified, under 'balancing' principles, by the state's interest in self preservation and in the qualifications and fitness of its employees.[23]" (215 F. Supp. 439, at 447, 448.)

Thus, the District Court "balanced" away many of appellants' First Amendment freedoms, including several which are necessary to appellants for "their performance of their academic function." An application of these oaths to appellants, and others similarly situated, means that they will have to give up, absolutely, several of their First Amendment freedoms as a condition of retaining their academic employment.

The Oaths Will Also Effectively Deter Appellants' Free Expression and Conscience

In addition to the consideration of abandonment of constitutional rights, there is the consideration of deterrence of others. Even if appellants were to execute these oaths, which they refuse to do, appellants' rights to free expression and honest conscience would be substantially deterred. The deterrence of appellants' free exercise of their liberties of speech, association, academic freedom and honest conscience, guaranteed by our Constitution, takes on particular significance when one considers the possibilities of a perjury prosecution, or the threat of a perjury prosecution, for falsely executing the oaths. The indiscriminate sweep of the statutory definitions can only add to the deterrence of free expression when they are considered in light of recent social developments in many of our Western states, including the State of Washington.

At one time, perhaps, the threat of prosecutions may have been rare. But, today, our society has witnessed a rising movement in the name of anti-communism. Professional anti-communism is dangerously close to becoming as doctrinaire as communism itself—and may, indeed in some areas it does, embrace the root evil of totalitarianism—

intolerance. (See, Bell, D., (ed), The Radical Right (1963); Sherwin, The Extremists (1963); Ellsworth, R. and Harris, S., The American Right Wing (1962); Suall, I., The American Ultras (1962); First National Directory of Rightist Groups (1962); Gould, G., Inside the Birch Society (1961).) The presence of these groups in our society means that there are now jurymen who might quite likely convict for perjury on the basis of the Washington statutes set forth above.

The State of Washington, too, has a strong component of anti-communists within its boundaries (see, Gottfried, A. and Davidson, S., The New Right in Action, *The Nation*, July 29, 1961, reprinted in Hearings, Subcommittee of the Senate Judiciary Committee to Investigate Attacks on the Internal Security Act, August, 1961). A recent article by Professor Alan F. Westin, entitled "Anti-Communism And The Corporations," 36 Commentary 479 (1963) states, at pages 481-482:

> "What of these 'blue-chip' companies? Have they been urging Birch Society and Christian Church Crusade materials, either for in-plant or outside-the-gate programs? Many unfortunately have.
>
> "For example, Boeing, the 19th largest company in the nation, with 88,000 employees and over one billion dollars in defense contracts, presented Dr. Nicholas Nyaradi to its Supervisors Club in Seattle on October 31, 1961. Billed as a discussion of anti-Communism, the speech featured such remarks as Dr. Nyaradi's view of the twenty-six African nations that joined the U. N. in 1960:
>
> "'When I watched last year the procession of those distinguished trial chieftains and witch-doctors as they paraded down there in UN head-

quarters, with their very fancy headgears and their leopard skin coats and what-not, at the very same time a wild rumour swept the halls of the UN. According to this, it was said that the president of one of those new republics, the Republic of Gabon, five years ago ate up his own mother-in-law. Well, the rumour was neither confirmed nor denied. But as I watched these distinguished witch-doctors, honestly speaking, I couldn't help but believe that the main reason why they came to New York was to study the American food processing industry. They must have been interested in how to prepare instant missionary, or frozen TV explorer dinners, or what-not.' (Quoted in *The American Liberal*, July 1962, p. 7.)

"Boeing reprinted this speech, bristling with similar points about 'first-and-second-generation cannibals,' and distributed it to Boeing management as a worthwhile contribution to education about Communism.

"

"The blue-chip corporate community has also been represented in abundance at another and similar type of seminar—the Freedom Forums held annually by the National Education Program, producers of *Communism on the Map*. In recent years, these have been organized around the central theme of Communism, and offer such stellar lights of the John Birch Society as Tom Anderson, Clarence Manion, and Glenn Green as speakers, along with Eddie Rickenbacker and other assorted rightists. In 1961 and 1962, the following companies, among others, sent executives (many of them the training or public affairs officers at company plants) to soak in this priceless education: Boeing Aircraft, Houston Lighting and Power, Monsanto Chemical, Gulf Oil, Southwestern Bell Telephone, Stockham Valves and Fittings, Pontiac Motor Division, Quaker Oats, and Goodyear Tire and Rubber.

"

"Still another major link between blue-chip cor-

porations and nonsense anti-Communism involves the Christian Anti-Communism Crusade of Dr. Fred Schwarz. . . . The characteristics of the Schwarz movement are: (1) a roster of speakers that includes many radical-right figures who add the specific rightist appeals that Schwarz himself avoids (speakers like W. Cleon Skousen, for example, who demands a housecleaning of the State Department, a break in diplomatic relations with all Communist and neutralist countries, withdrawal from the U.N., etc.); (2) a complete absence of liberal anti-Communists or social-democratic anti-Communists from school platforms; (3) a tendency to allow Birch Society and other radical-right groups to attach themselves to the schools in order to recruit new members from among the audiences.

". . . Schwarz's special luncheons for businessmen, furthermore, have attracted as many as five hundred to six hundred participants at a time in West Coast, Midwestern, and Southern cities. In 1962, such a luncheon in Seattle brought executives from Wigwam Stores, Standard Insurance Co., Boeing Aircraft, National Bank of Commerce, Associated Grocers, and Puget Sound Bridge and Dredge Co. into the hall to support the Schwarz 'crusade' in that city."

Appellants fear that, as of late, the attention of many right-wing extremist groups has been focused more and more upon our colleges and universities. (See, 49 AAUP Bull. 323-327, 336-359 (1963)).

That these are not idle fears is clearly revealed by the course of recent events. Three students at the University of Indiana, members of a student group known as the Young Socialist Alliance, were recently indicted by an Indiana grand jury for having violated that state's anti-communist statute which is worded with extremely similar terms to those in question here. The indictments are reported to charge that the three students assembled "for

the purpose of advocating or teaching the doctrine that Government . . . should be overthrown by force, violence or unlawful means . . ." *The New York Times*, Western Edition, for Friday, May 3, 1963 at page 9 reports as follows:

> "'The important thing in this case,' Mr. Hoadley [Monroe County, Indiana, prosecuting attorney] said, 'is to get this organization off the campus. The University is a department of State Government'."

The above indictments were later dismissed. But, as the following reprinted editorial from the October 12, 1963, issue of the *New York Times* indicates, the defendant students have been reindicted. This means that a different Indiana grand jury must have been so inclined:

"The New York Times."
"October 12, 1963."

"FREEDOM ON THE CAMPUS"

"To say that freedom should be less experimental on the campus than in other areas of American life is to undermine the basic educational idea of a university of scholarship.

"Several current university cases point up a contrast in attitudes on this question. At the University of Alabama in Tuscaloosa a student editor of the campus newspaper, The Crimson-White, has had to sign an oath, as a condition of school attendance, saying that he would 'refrain from gratuitous or nongratuitous service with the news media in matters expressly touching on race relations . . . at the university.' Thus, on the burning issue of the day, the campus editor must be silent, not allowed to report to the outside world what is happening in his own university.

"A similar issue of freedom of expression arises at

Brooklyn and Queens Colleges here in New York. Two of the student leaders of last summer's trip to Cuba have been refused permission to speak before student organizations that had invited them. The college administrations have rationalized their decision by citing the Board of Higher Education's ban against speakers who are under 'judicial consideration.' The fact that these two students have been indicted by a Federal grand jury should not convict them beforehand—and prevent their voices to be heard and opposed on campus.

"At the University of Indiana three students who are officers of the local Young Socialist Allegiance chapter have been reindicted by a county grand jury under a 1951 state law 'to exterminate Communism and Communists and any and all teachings of the same.' An earlier indictment was quashed.

"The university has refused to take any action against the students. President Elvis J. Stahr showed courage and understanding of the university role when he declared: 'We have far too much to lose ultimately if we unleash the forces of suppression under the guise of protecting freedom. . . . Indeed, the wrong kind of hunt for the presumed villain can too easily be more damaging to freedom than the villain himself.'

"That is the difference between freedom and non-freedom on campus."

Since preparing the Pre-Trial Order, but in time to be included in plaintiff-appellants' trial brief, appellants have come upon a document entitled "American Intelligence Service," Vol. I, No. 2, August, 1962, published by Mr. A. F. Canwell, Director, Spokane, Washington, and former chairman of the Un-American Activities Committee of the Washington State Legislature which says of the

American Civil Liberties Union of Washington, to which several appellants belong:

> "The Washington State Chapter is one of the most effective units of the American Civil Liberties Union because it has some of the ablest left-wing lawyers in the country on its board: There are men who are on many of the major Communist fronts, who also are officers on the National American Civil Liberties Union and on the State Civil Liberties Union."

Mr. Canwell concludes Vol. I, No. 2:

> "One cannot overestimate the danger. These agents are everywhere. They are in key positions. They are in the ministry of the churches. *They are in our educational system.* They are in the scientific fields. They are at the highest levels of government." (Emphasis supplied.)
>
> "Only a Knave or a fool would underestimate the danger. It has never been greater."

Professor Melvin Rader, appellant, and twice Chairman of the Washington Civil Liberties Union (R. 209), has been the subject of increasing right-wing attack. The investigation of Professor Rader by the Washington Un-American Activities Committee has been set forth in the Statement of the Case. Although the Washington Un-American Activities Committee Report about him has been proved false, Professor Rader continues to be linked with Communism, subversion and deceit. One recent example occurred on December 14, 1963. On that day, printed on the reverse side of its front page, the *Seattle Times*, the largest Seattle newspaper with over 250,000 circulation, reported the following story involving Professor Rader:

"No Half Ways For Reds, Says Witness"

"OKANOGAN, Dec. 14.—(A.P.)—Barbara Hartle, former Communist, says she does not believe it possible for any person to be in a Communist cell and not be 'totally committed to Communism.'

"The 55-year-old one-time convicted Communist conspirator, who renounced Communism and has testified in several state and federal hearings, will be called back to the stand when trial of the $225,000 Goldmark libel suit goes into its seventh week Monday.

"Mrs. Hartle, now living on a small chicken ranch at Evans, north of Spokane, was questioned by a defense attorney, E. Glenn Harmon, yesterday. In his query about Communist-cell membership, Harmon said he referred to 1934-43, during which Mrs. Goldmark has admitted belonging to a unit at Washington, D. C. She says she later dropped party membership.

"Could any person, the attorney asked, be a member of a Communist cell anywhere and not be 'totally committed' to Communism. After Goldmark attorneys' objections were overruled, Mrs. Hartle replied: 'No, it would not be possible.'

"Mrs. Hartle testified the Communist Party worked for the political defeat of legislator Al Canwell of Spokane, one of the four individual defendants.

"She was asked about the party's feeling about the state legislative un-American activities committee headed by Canwell in 1948. She replied:

"'The attitude . . . was to maintain an all-out campaign for the defeat of the Canwell committee and later of Mr. Canwell, himself.'

"Canwell was defeated for re-election to the Legislature and in campaigns for the United States Senate and House."

"The Goldmarks contend they were libeled by statements and published matter in the 1962 primary election campaign in which he was defeated in his bid for re-election to the legislature.

"Mrs. Hartle was allowed by Superior Judge Theodore S. Turner to testify over the objections of the Goldmarks' counsel. The judge said he thought the 'nature of the Communist Party . . . is relevant because of the nature of the libel charge.'

"Judge Turner said neither side could ask questions which would bring out the names of persons in the Communist Party. However, questions could be asked, he said, where persons had been linked in testimony with the American Civil Liberties Union.

"The defense attorney, Harmon, then asked Mrs. Hartle about Prof. Melvin Rader of the University of Washington. Rader had earlier been identified in testimony as a former president of the Washington chapter of the A. C. L. U.

"Mrs. Hartle testified Rader had been a 'known member of the Communist Party.' She said she had attended a closed Communist Party meeting with Rader and that only party members could attend such sessions. She testified that Rader had been known in Communist Party circles as being 'under party discipline.'

"Notified of her testimony, Rader issued a statement at Seattle in which he vehemently denied Mrs. Hartle's statements. Rader said that as far as he knew he had never met Mrs. Hartle, and added:

"'I have never been a member of the Communist Party. I have never been under Communist Party discipline. I disagree fundamentally now, as I always have in the past, with the theory and practise of Communism.'

"In 1948, at a meeting of the Canwell Committee at Seattle, Rader also denied under oath that he had ever been a member of the Communist Party."

Thus once again, ominous clouds of suspicion, obloquy and subversion have started to gather around the reputation of Professor Rader. His history, since the Un-American Activities Committee Hearings of 1948 shows that this courageous man has been pilloried (R. 212-13) because he takes the dictates of our First Amendment seriously. Were Professor Rader to execute the oaths found on Oath form A, then it is not at all unlikely that he would, wrongfully, be subjected to a perjury trial, or the threat of one. Professor Rader is a professor of social philosophy; can he be expected to execute the oaths and fearlessly continue to explore and lecture on all aspects of Communism, Fascism, Socialism and Democracy?

Indeed, it is likely that the threat of a prosecution for perjury for falsely swearing that he is not a "subversive person" hangs over the head of every person at the University of Washington who would execute the oaths and who would continue to express views to the left of center, or, indeed, who takes seriously, and acts upon, the mandate of our First Amendment. Besides the threat of perjury prosecution, there is the very real threat of dismissal from academic employment. In 1941, at "Western Washington College of Education the president was dismissed after attack by a right-wing group for having allowed radical speakers on the campus, failing to hold patriotic meetings, allowing an 'anti-American' Social Science Club to function, and tolerating a 'subversive' campus newspaper." Emerson & Haber, Academic Freedom Of The Faculty Member As Citizen, 28 Law & Contemporary Problems 525, 536 (1963). The Report is found

in 27 A. A. U. P. Bull 48, and see, Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemporary Problems 487 (1963).

The threat of prosecution for perjury is not the only way in which the oath statutes deter the exercise of free expression and conscience. There is a consideration separate from that of perjury and separate from the vagueness inherent in the definitional sections of the oath statutes, and which serves only to reinforce the deterrence of free expression. The University of Washington, pursuant to a statutory command of the 1951 Washington Subversives Activities Act, has instituted procedures designed to ascertain whether any professor who executes the disclaimer oath has subsequently become a "subversive person." (See, Ex. 4, "Basic Consideration Involved In Appointment of Faculty" Vol. II, Faculty Handbook, pp. 19-21.) Sec. 12 of Chapter 254, Laws of Washington, 1951 (RCW 9.81.070) provides:

> "Sec. 12. Every person and every board, commission, council, department, court or other agency of the State of Washington . . . who or which appoints or employs or supervises in any manner the appointment or employment of public officials . . . shall establish . . . procedures designed to ascertain whether any person is a subversive person."

The command of this statute is clear. The reason a continuing surveillance of the professorial teaching and research faculty is necessary, even after a professor should execute the oaths, is that a "subversive person" is, by statute, ineligible for public employment. It matters not when a person might become a "subversive person."

whether before or after executing the oath. In either event he is ineligible for University employment:

> "No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (Sec. 11, Chapter 254, Laws of Washington, 1961; RCW 9.81.060.)

The nature and scope of the surveillance procedures that would be involved are adumbrated in the Washington Subversives Activities Act of 1951.

The heavy toll taken by test oaths of University professors has been indicated by Professor Brown of the Yale Law School in Loyalty and Security-Employment Tests in the United States (1958) pp. 120 ff., and, passim. A summary of the tests practiced appears at pp. 130-1. At p. 339, Professor Brown indicates that teachers are especially vulnerable to loyalty and disclaimer oath tests:

> "The fact that most teachers are public employees makes them especially vulnerable to loyalty tests on the grounds advanced with respect to civil servants. (See pp. 333 to 338). On the other hand, this is a field in which no valid security considerations exist, except in special areas of applied military research that are not primarily part of the business of seeking and transmitting knowledge."

Also see pages 333 and 339 to 349 of Professor Brown's book for further discussion regarding loyalty oath tests and their impacts upon teachers.

We agree with Professor Brown that in special areas of applied military research considerations different from

normal academic employment prevail. It may be appropriate in those special areas to subject those who engage in military research to individualized security screenings. However, many appellants, e.g., Professors Halpern, Dash, Eaves, English, Jacobsohn and Geballe (R. 188), and others similarly situated, who do contract research involving access to classified information, already possess security clearances "granted by at least one of the following: The United States Atomic Energy Commission, The United States Air Force, the United States Navy or The Boeing Company" (R. 188). In light of these facts, there can be no reasonable grounds justifying the State legislature's requirement that these appellants, already possessing security clearances, execute Oath form A before they become eligible for academic employment at the University of Washington.

Loyalty oaths deter freedom of expression by having an unhealthy and intimidating impact upon a person's conscience and personality. They contribute to increased anxiety and the disruption of emotional and intellectual integration of individuals, and make for estrangement of the individual from his society. They impinge upon freedom. The Committee on Social Issues of the Group for the Advancement of Psychiatry has studied loyalty oaths, reporting their findings in Considerations Regarding the Loyalty Oath as a Manifestation of Current Social Tension and Anxiety, G.A.P. Symposium, No. 1 (Oct. 1954). This group of psychiatrists state that a loyalty oath

> "... places the individual's loyalty in question, it forces him to defend it, it forces him to deny an im-

plied accusation of treasonable intent toward his government. In its manifest content, the current loyalty oath is threatening and coercive. In its latent content, it generates an atmosphere of accusation and suspicion." (Page 2)

"We are witnessing a perceptible change in the pattern of authority creating conflicts within the individual and between the individual and society. The increasing enforcement of defensive oaths, often demanded yearly, engenders suspicion and anxiety. This anxiety is akin to that experienced by a child who becomes alienated from the authority of his parents by: (1) the lack of trust in him sensed by the child; (2) the increased threat of punishment. In this pattern of relationships, the value of the parent as a model becomes diminished and identification with the parent becomes more difficult.

"The conflict can be readily understood by examining the situation of teachers who, as a group, are particularly hard hit by the negative aspects of the oaths. They are constantly forced to submit to an authority which seemingly does not trust them nor accept them as mature, responsible people. This results in alienation from the authority, self-depreciation, limitation of function and devaluation as models for the next generation. All this engenders hostility in the teacher which he may displace (a) towards his peers by an intensified suspicion of them and by both accusing and provoking accusations from them; (b) towards the student group, which he now might begin to limit as he himself feels limited. Furthermore, he becomes confused by the official sanction of attitudes incompatible with heretofore unquestioned collective ideals which he was accustomed to pass on to his pupils. Here are some of these discrepancies: The conflict is by [no] means limited to the teacher. The government official, the industrial leader, the lawmaker, find themselves in similar positions, being both threatened by and having to impose the coercive and constrictive atmosphere concomitant

with the oath procedure. Patterns of relationships thus established undermine trust in and respect for constructive governmental authority. It has been amply demonstrated that the oath as a detective or deterrent agent has but little value. In fact, it is no security measure at all. The real internal enemy is not frightened nor made to feel guilty by perjury. Furthermore, his identity becomes obscured since an ever increasing number of 'deviant' individuals and groups are drawn into the vortex of suspicion." (Page 2-3)

The above views have been underscored by Dr. Marie Jahoda, a social psyschologist at New York University:

"Let me end by summarizing our study thus: There is a real danger that the loyalty and security measures which are, of course, designed to preserve the security of a democratic and American way of life are —unwittingly perhaps—administered in such a way that they endanger what they are set up to protect." (Considerations Regarding the Loyalty Oath as a Manifestation of Current Social Tension and Anxiety. G.A.P. Symposium, No. 1, Oct. 1954, pp. 11-12.)

It seems to us obvious that the 1931 and 1955 oaths guarantee that there will be a realization of the dangers foreseen by Dr. Jahoda and that they contradict an absolute requirement of academic freedom:

"The *values* of freedom can be supported only by the *methods* of freedom. The very experience of being free in the examination of facts is the only effective way of learning the values of freedom. The attempt to teach democratic values by the undemocratic methods of indoctrination and propaganda is inherently contradictory, for students will quickly sense the inconsistency and suspect their teachers of hypocrisy. They will become bored or cynical if they see that the educational process is cut and dried. This would hardly provide the basis for genuine loyalty to democ-

racy." (Melvin Rader, Teaching About Communism, 64 Teachers College Record 577, 579 (1963).)

This Court appears to have looked ahead to this day when it said that it "would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." And, realistically, "experience teaches that prosecutors too are human." *Cramp v. Florida*, 368 U.S. 278 at 286-7.

Were a professor prosecuted for perjury, before right-wing jurymen, much of the evidence would, most likely, come from students who sat in his classes. Given the now realistic threat of prosecution for perjury, today's anti-communist attitudes, and the possibility of student testimony against him, what professor can execute the oaths in question here and then courageously proceed openly and fairly to discuss the controversial social issues present in today's society? Could Professor Rader continue to discuss Marxism or Communism or Democracy? It matters little whether the perjury prosecution is successful. The threat of such a prosecution would cast a pall of orthodoxy over the classroom. It is an old and ugly subtlety to strike freedom of the mind in the name of patriotism with the fist of loyalty. Given the threat of prosecution, Professors will fear a continuing surveillance of their teachings and activities, to sift their loyal words from the disloyal. Discussion will end where it should begin; orthodoxy will prevail. There can be no academic freedom in such a situation. "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the

free intellect." *Adler v. Bd. of Ed.*, 342 U.S. 485 at 510 (dissenting opinion).

Thus, it is not idle when appellants state, in the record of this case, that they fear that if they executed either "Oath Forms A or B that they may subject themselves to harassment and the threat of prosecution for perjury." (R. 188.)

The record in this case amply supports the fears of appellants:

> "What I fear if I sign the oath is that I would have to compromise my conscience and my professional obligation to search for truth and that some member of the class will report my statements about the past improper actions of the United States and that I will be charged with perjury on the grounds that I am a 'subversive person' or that I am violating the oath [of undivided allegiance]. Various super-patriotic societies, like the John Birch Society, collect from students statements made by professors in their classes. I do not believe that I can execute Oath Form A and continue to discuss these matters as I have in the past." (Statement of Professor W. Stull Holt, R. 195-6.)

The record is replete with such realistic statements (R. 198-9); Professor Valentine; (R. 209), Professor Rader; R. 216-217); Professor Dietrichson. These statements have not been impeached and they are in the record. There is nothing in the record to contradict them or to weaken them. They are true.

Nevertheless, the District Court casually dismissed all argument on this point:

> "*It has not been shown that upon subscribing to*

the 'disclaimer' oath plaintiffs will thereby experience any stifling of their freedom of inquiry, criticism and dissent, nor that their academic freedom will be impaired. Without questioning the sincerity of plaintiffs' fears that public hysteria or the temper of the times might conceivably at some future time bring about such a result *we are unable in this declaratory judgment action to find any substantiation for such fears, on the face of the statute, or in the facts of record or within judicial knowledge.* It is our conclusion that Chapter 377, Laws of Washington, 1955, does not constitute a prior restraint on First Amendment freedoms, nor are we constrained to find its language to be vague and uncertain." (Emphasis supplied.)

We submit that the lower court committed error when it made the wrong substantive decision on this point when it assumed the existence of facts not found in the record of this case, and when, in deciding the issue, it ignored facts inescapably found in the record. It is beyond all doubt that an application of the 1931 and 1955 oath statutes to appellants, and others similarly situated, will materially interfere with, and abridge, the exercise of their First Amendment rights to freedom of expression and free conscience.

The 1931 and 1955 Oaths Are Applicable to Citizen and Alien Professors Alike, Requiring Both to Abandon and or Deter Free Expression as a Condition of Employment

It should be noted that the 1955 and 1931 oath statutes apply equally to American citizens and aliens. Appellees do not challenge or question the fact that the 1955 oath applies to citizens and aliens alike, but the state attorney general argues that the 1931 oath applies only to American citizens and not to aliens. It is counsel for appellants

submit that the 1931 oath works a denial of equal protection of the laws against appellants. However, the 1931 oath *does* apply to aliens as well as to citizens. Aliens, too, as a condition of teaching employment at the University of Washington must swear to promote "undivided allegiance to the government of the United States."

The argument of the state attorney general is not a nice one. It is to the effect that the 1931 oath does not apply to aliens because University of Washington officials refuse to follow the express statutory command of the Washington legislature and refuse to administer the oath to alien faculty members. There can be no doubt that the 1931 oath statute, on its face, applies to aliens and citizens:

> "Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, . . . shall before entering upon the discharge of his or her duties subscribe to the oath . . .". (Sec. 2, Ch. 103, Laws of Washington, 1931, see, Appendix A.)

It is true that several University administrations prior to the current one of President Charles E. Odegaard, did not administer to aliens the 1931 statutory oath in its statutory form. What the previous administrations did was to allow an alien to alter the statutory wording of the 1931 oath to suit that alien's conscience and convenience (R. 159), a privilege not afforded to citizens, and then allow the alien professors to execute the altered oaths.

Whatever may have been the past practice at the University of Washington, there can be no doubt that its

current President, Charles E. Odegaard, intends to carry out his duties under the 1931 statute and require that all aliens who are members of the teaching staff execute the 1931 and 1955 oaths. Even if he wished to do otherwise, he could not, because of the publicity given this aspect of this case.

President Odegaard has stated that, "upon advice from the Attorney General of the State of Washington," on May 28, 1962, he made a demand "upon *all* employees of the University of Washington that they execute Oath form A or B, whichever might be applicable to them." (R. 176.) Oath form A carries the 1931 oath and must be executed by the teaching faculty (R. 162).

On June 4, 1962, Provost of the University of Washington, Frederick P. Thieme, informed the University of Washington Deans, Directors and Departmental Chairmen that they should begin their responsibility for obtaining an executed 1931 oath from "*all* persons having teaching responsibilities," that is, "*all* teaching fellows, predoctoral associates, lecturers, instructors, and the professorial ranks." (R. 163.) Vice Provost, Glenn Leggett has stated that the memorandum from Provost Thieme to Deans, Directors, and Departmental Chairmen "instructed the university officials to begin administering Oath form A or B, whichever may be proper in each case, to the personnel employed by the University of Washington." (R. 185.) The chairman of the Department of Philosophy, seeking to carry out his administrative duties, confronted appellant Paul Dietrichson, a citizen of Norway, and demanded that Professor Dietrichson, without modification,

execute the 1931 oath (R. 303-4). Thus, this matter is too clear for further argument. At least since May, 1962, the administration of the University of Washington, on advice of counsel, the Attorney General, has tried to apply the 1931 and the 1955 oaths to aliens as well as to citizens, and this application is the subject of an express stipulation, and the following admitted fact: "... pursuant to a statute, a demand was made by President Odegaard, on May 28, 1962, that *all* members of the teaching staff, *including aliens*, execute the oath Form A here in question." (R. 159.) (Emphasis supplied.)

The lower court erroneously cited only one case: *Poe v. Ullman*, 367 U.S. 497, as justification for its holding that: "The alien plaintiffs may not challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced." The cited case does not control because the facts are not present in the case at bar for *Poe v. Ullman* to be operative. There is absolutely nothing in the record to show that the 1931 oath "has never been enforced" as to aliens. To the contrary, the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors at the University of Washington (R. 158-9). Thus, the lower court's holding assumes a state of facts not found in the record, the possible existence of which is expressly contradicted by the record and *Poe v. Ullman* is not operative here. Since some version of the oaths consistently has been required of aliens, then it is clear that they have standing to challenge the oaths under the rule of *Cramp v. Florida*, 368 U.S. 278, and that the District

Court committed error in denying alien appellants this right.

Furthermore, the holding of the District Court necessarily demands that it presently approve an invidiously discriminatory past practice of University officials, which, in operation, amounts to an unconstitutional denial of the equal protection of the laws, thereby abridging the Fourteenth Amendment. This Court has long held that, although a state statute may be fair on its face and impartial in its appearance, yet, if it is applied and administered with an unequal hand to persons in like circumstances, then, it is a denial of equal protection of the laws. The Fourteenth Amendment clearly requires equal operation of the laws upon all persons who are in like circumstances. *Yick Wo v. Hopkins*, 118 U.S. 356; *Soon Hing v. Crowley*, 113 U.S. 703; *Chy Lung v. Freeman*, 92 U.S. 275, and *Maxwell v. Bugbee*, 250 U.S. 525. The unconstitutional past practice of the University administration was that of administering the statutorily-worded 1931 oath unevenly to professors, invidiously discriminating between citizens and aliens (R. 158-9). This practice was relied upon by the District Court as supporting its holding that alien appellants have no standing.

In addition, the past practice discriminated within the alien class itself, in not requiring a uniform oath of all aliens. Thus, even under the strict test of *Goesaert v. Cleary*, 335 U.S. 464, the past practice is unconstitutional, not only because it discriminated between aliens and citizens seeking the same position, but because it discriminated among the class of aliens seeking the same

position, there being no uniform oath applicable alike to all aliens. It works an "irrational discrimination between . . . groups of persons . . ." *Goesaert v. Cleary*, 335 U.S. 464 at 466. Yet, the District Court relied upon the validity of this unconstitutional past practice for support for its ruling. This is clear error, for the lower court's holding rests on an unconstitutional premise, and cannot be allowed to stand. (*Takahashi v. Fish and Game Commission*, 334 U.S. 410 at 420: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.")

C. First Amendment Freedoms of Expression and Conscience May Be Infringed Only to Prevent Some Substantial Evil Which Presents a Clear and Present Danger, or for Some Other Equally Overriding Consideration.

The constitutional rights of appellants which are invoked here are basic to a free society. General legislation of a state which does not touch or concern these fundamental rights will be upheld by this Court if the state legislative body had a "rational basis" for acting. However, where state legislation touches and concerns these First Amendment freedoms a "rational basis" alone will not suffice because "freedoms of speech and of press, of assembly, of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639.)

This case involves not only the disqualification of otherwise fully qualified professors from the possibility of continued state university employment based on non-advocacy, non-association and non-publication, but also these declarations of non-advocacy, non-association and non-publication are one of the means of implementation, backed up with the potent sanctions of dismissal and perjury prosecutions. Furthermore, the 1931 oath, backed by the same potent sanctions, demands conformity to, and promotion of, "by precept and example" of certain legislatively approved doctrines.

This Court in the past has upheld such provisions, if at all, only where there existed some grave danger or overriding consideration deemed sufficient to warrant an infringement on First Amendment freedoms, such as Congress' attempt to prevent the danger to interstate commerce posed by political strikes (*Am. Comm. Assoc. v. Douds*, 339 U.S. 382) or a city's interest in maintaining the integrity and efficiency of a city's civil service system (*Garner v. Bd. of Pub. Wks.*, 341 U.S. 716). Of a similar nature is *Adler v. Bd. of Ed.*, 342 U.S. 485. However, *Adler* should be sharply distinguished from the case at bar. In *Adler*, this Court passed only on a state's power to create a rebuttable presumption of evidence based on associational activity, when that presumption could be rebutted at a meaningful hearing. In the case at bar, there is no meaningful hearing, and a professor must execute the oaths absolutely to qualify as being eligible for university employment. Nevertheless, *Adler* is somewhat similar in the interest of the state which it presented.

On the other hand, this Court has held that the governmental purposes found in the above cases are insufficient to sustain a state law which crosses over the line of demarcation set by the due process clause and which, as do the oaths in this case, punish the "innocent with the guilty" (*Wieman v. Updegraff*, 344 U.S. 183), or when the breadth of state infringement is too broad:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." (*Shelton v. Tucker*, 364 U.S. 479, 488.)

It would appear that this Court has set forth the task of lower courts in such cases as this one, in *Am. Comm. Ass'n v. Douds*, 339 U.S. 382, at p. 399, where it said:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

Thus, the test is one of "balance." (See, Frantz, The First Amendment In The Balance, 71 Yale L.J. 1424.) We think the oaths in this case go well beyond "an indirect, conditional partial abridgment of speech," and that the "balance" must be struck in favor of appellants.

When this Court has balanced the conflicting interests, in no case has it allowed an abridgment of the First Amendment without first satisfying itself, in some particularity, that the nature of the evils perceived by a state

legislature were actually present in sufficient magnitude to warrant the infringement, and no more. The decided cases go no further. The evil is examined, whether it be in the area of political strikes, high school education, or the integrity of a city's civil service, and a necessary infringement, if any, of First Amendment rights may be allowed, *but only to the limited extent absolutely necessary to meet the evil.*

When statutes which deter or prohibit, criminally or otherwise, as is the case here, mere knowing membership in any organization, including membership in the Communist Party, come before this Court, it emphatically requires that they:

> ". . . must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifially intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. U. S.*, 367 U.S. 290, 299-300.

When judged by these standards, we believe that the decision below with respect to the constitutionality of the 1955 and 1931 oaths cannot be allowed to stand.

D. The Court Below Upheld Infringements on Free Expression and Conscience Without Any Showing of Nexus or a Subordinating State Interest Which Is Compelling.

The power of the legislature to require oaths from state employees, including university professors, fully as much as the power of legislative investigation (*Sweezy v. New*

Hampshire, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539), must, at some point, be checked by the countervailing command of the First Amendment. This Court has consistently taken the position that state power is subject to such limitations, and it repeatedly has held that a state does not have power to enact any type of oath it could conceivably choose. For example, a state has no power to require oaths, as conditions of employment, which do not carry a requirement of knowledge (*Wieman v. Updegraff*, 344 U.S. 183); nor does it have power to prescribe oaths, which, although requiring knowledge, are, nonetheless, vague and not susceptible of objective measurement (*Cramp v. Florida*, 368 U.S. 278); nor, significantly for this case, does a state have power to require certain statements, made under oath, from teachers which "broadly stifle fundamental personal liberties when the end can be more narrowly achieved," although the knowledge requirement might be present, and although the governmental purpose might be "legitimate and substantial." (*Shelton v. Tucker*, 364 U.S. 479 at 488.) We submit that the Washington legislature in this case has broadly encroached upon fundamental liberties, contrary to the First Amendment's limitation on state power, and that the state's legitimate interest could more narrowly be achieved by using procedures which are already in existence, without recourse to the statutes requiring the two oaths.

It is clear that the Washington legislature has no power under the First and Fourteenth Amendments to require, as a condition of state employment, that all state employees execute oaths that either they are, or are not, Jews, Catholics or Protestants, or execute oaths that either they are,

or are not, members of the Republican or Democratic parties, or execute oaths that either they do, or do not, advocate, abet, advise or teach by any means the desirability of governmental subsidization of contraceptives as a means of population control. Such oaths, as conditions of employment, would obviously contravene the mandate of the First Amendment, even though, like the Washington oaths, they carried the requirement of knowledge. Wherever this Court may draw the line as to the exact point at which the First Amendment does operate as a limitation on state authority, we submit that the legislature of the State of Washington has over-stepped that boundary line in this case.

No one questions the power of a state legislature, subject to overriding federal power, to enact legislation prohibiting acts of violence to overthrow, destroy or alter constitutional forms of government. Furthermore, under *Dennis v. U.S.*, 341 U.S. 494, a state may proscribe the direct advocacy of immediate force or violence for such purposes, whether by individuals or by organizations. The Washington legislature, in 1909, exercised this power and enacted Washington's criminal anarchy and sabotage statutes (RCW 9.05 et seq.), not in issue here. The power of the state extends to these areas, and Washington's criminal anarchy and sabotage statute occupies these areas fully. But, the state clearly has no power, by reason of the First and Fourteenth Amendments, to prohibit, or unduly burden, by way of oath, or by way of defining a crime, academic or political activity, association or discussion which is directed toward political or social change through peaceful, democratic methods. *Stromberg v. California*,

283 U.S. 359; *De Jonge v. Oregon*, 299 U.S. 353; *Taylor v. Mississippi*, 319 U.S. 583; *Terminiello v. Chicago*, 337 U.S. 1; and see *Sweezy v. New Hampshire*, 354 U.S. 234; *NAACP v. Alabama*, 357 U.S. 449; *Speiser v. Randall*, 357 U.S. 513; *Bates v. Little Rock*, 361 U.S. 516; *Shelton v. Tucker*, 364 U.S. 479; *NAACP v. Button*, 371 U.S. 415, and *Gibson v. Florida*, 372 U.S. 539.

Nor does a state have any power to prevent academic discussions of political and social issues, even where those discussions may directly relate to the doctrines of bloody revolution, force and violence. *Dennis v. U.S.*, 341 U.S. 494, at 501-2. This Court has drawn a sharp line between advocacy of forcible overthrow and the incitement of action to that end. *Yates v. U.S.*, 354 U.S. 298. Nor does a state possess constitutional power to prohibit or forbid knowing, but inactive, membership in the American Communist Party. Such membership might be held by one who is foolish, deluded or optimistic, but he cannot be made a criminal because of it. *Scales v. U.S.*, 367 U.S. 203 at 229-30. Counsel submit that a person, other than members of the F.B.I., could also be a member of the Communist Party for purposes of studying it and for the scholarly purpose of obtaining first-hand information about its character and social significance in our society.

Nevertheless, the Washington oaths demand that an affiant, among other things, swear that he is not knowingly a member of "any organization . . . a purpose of which is to . . . teach activities . . . intended to . . . assist in the . . . alteration of the constitutional form of government . . . of any political subdivision of them (U. S. or

State of Washington) by force." (See appellant's Exhibit No. 14, question 530 at page 46.) In essence then, the Washington statute prohibits the mere knowing membership of "A" in the communist party and also in all other organizations which have as one of their purposes the teaching of doctrines or activities to "B" which are intended to assist in the overthrow of the constitutional form of government by force. It catches up the assistant to the assistant. It does not say that mere knowing membership must be accompanied with clear proof that the member himself or the person who is taught, *"by any means,"* actively and "specifically intends to accomplish the aims of the organization by resort to violence." *Scales v. U. S.*, 367 U. S. 203, 229, and see, *Noto v. U. S.*, 367 U. S. 290, 299. The Washington Statute does however, make "A" accountable for the speech and acts of "B." The statute aims at constitutionality protected association.

In *Scales v. United States*, 367 U. S. 203, this Court carefully marked off the boundaries of the First Amendment as it applies to assembly and associational membership. In that case, and pursuant to past decisions, this Court construed the Smith Act's membership section, in such a way as to meet constitutional objections thereto:

> "Thus the member [of the Communist Party of the United States] for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite intent 'to bring about the overthrow of government as speedily as circumstances would permit.' Such a person may be foolish, deluded, or perhaps optimistic, but he is not by this statute made a criminal." (*Scales* at 229-230.)

In *Scales*, this Court said that a statute has met Fifth and First Amendment requirements after it has been,

> "... found to reach only 'active' members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." (*Scales v. U. S.*, 367 U.S. 203, 228.)

Once this constitutional standard has been met then: "Little remains to be said concerning the claim that the statute infringes First Amendment freedoms [of private association and assembly]."

In short, it is beyond the power of a state to prohibit or punish *all* knowing associations or memberships in an organization, e.g., the Communist Party, or otherwise, which has been shown to engage in the proscribed advocacy. (But see, RCW 9.81.030 making mere membership in a "subversive organization" a felony, and RCW 9.81.083 declaring the communist party to be a "subversive organization.") The State's exercise of power must be more selective. Another element is necessary. There must be a clear indication that each accused member of such an organization specifically and actively intends to accomplish the aims of the organization by resort to violence. Otherwise, freedom of association is too easily abridged, and guilt by association would become part of our law. (*Noto v. United States*, 367 U.S. 290, 299; *Scales v. United States*, 367 U.S. 203, 229.) But, the Washington oath statutes seek to prohibit many associational activities which are constitutionally protected under the above

standards. Such power does not reside in the Washington legislature under the First and Fourteenth Amendments.

The First Amendment limitations on state power to restrict freedom of speech have also been set forth by this Court, and the 1955 and 1931 oaths clearly go beyond them:

> "We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently persuasive to lend color to the otherwise ambiguous theoretical material regarding Communist party teaching, and to justify the inference that such a call to violence may fairly be imputed to the party as a whole, and not merely some segment of it." (*Noto v. U.S.*, 367 U.S. 290, 297.)

State power to legislate in these areas, including legislative prescription of oaths, with their enormous capacity for restraint and suppression, is excluded because "where the First Amendment applies, it is a denial of all governmental power in our federal system." *Marsh v. Alabama*, 326 U.S. 501 at 511. The State, even as an employer, is still subject to the requirements of the Constitution.

Yet, it is precisely these constitutionally forbidden areas that the Washington legislature seeks to invade when it demands that, as a condition of continued employment, appellants, and others, execute the oaths here at issue.

The District Court, below, displayed a lack of under-

standing as to where the line should properly be drawn, and, in upholding the Washington oath statutes, it upheld the power of a state to penalize all advocacy of the legislatively prohibited doctrines; regardless of their immediacy to violence or their generation of public disorder:

> "As to the alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination,[28] or lack of frankness and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point." (215 F. Supp. at 450.)

It is evident that the District Court has failed to understand the distinction which this Court has drawn between advocacy which may be penalized—(involving a call to violence)—and advocacy which may not. The District Court also failed to understand the distinction between association which may be penalized (active) and association which may not (inactive but knowing membership). All advocacy and association, particularly in a university setting, are not "actions," nor have they ever been so held by this Court. The constructions of "advocacy" and "association" given by the District Court, below, are not narrow

ones. They seem to draw the line at mere belief, and are in accord with the construction of the statutes given by the Washington State Supreme Court (*Nostrand v. Little*, 58 Wn.(2d) 111, at 130 and *Nostrand v. Balmer*, 53 Wn. (2d) 460; see Statement of the Case). Academic discussion, attempts to persuade, advocacy short of a call to violence, along with inactive but knowing membership, all fall within the ban imposed by the Washington oath statutes upheld by the District Court, and which appellants must forego, under these oaths, as conditions of their continued employment.

As has been shown above, the two oaths seriously infringe upon freedom of thought, conscience, speech, and association. They can be justified, if at all, only if (1) the State of Washington clearly has a subordinating interest which is compelling and only if (2) there exists some nexus between appellants, and others, and the subordinating state interest. Otherwise, the mandate of the First Amendment must prevail. These two elements will be discussed in reverse order to their presentation above.

There Is No Nexus Shown by This Record

This Court recently has clarified the concept of Nexus, saying that "regardless of the label applied, be it 'nexus,' 'foundation,' or whatever, . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition *that the state convincingly show a substantial relation* between the information sought and a subject of overriding and compelling state interest."

Gibson v. Florida, 372 U.S. 539 at 546 (emphasis supplied). This nexus must be shown in order to justify the oaths. *Am. Comm. Assn. v. Douds*, 339 U.S. 382.

To decide the nexus question the District Court must look to the facts in this record to ascertain whether the required nexus has been supplied by the state, defendant-appellees here. Although counsel for appellants urged this course upon the District Court, it held that:

> "*It must be presumed* that legislative findings sufficient to justify the enactment of the 1951 statute were made, and that the 1955 amendment was supported by the same findings. We are therefore unable to accept plaintiffs' argument that there has been no showing of a public danger sufficient to justify the enactment of restrictive legislation." (Emphasis supplied.)

Thus, the District Court sustained the constitutionality of the Washington legislation by way of "presumption." In doing so it not only ignored the mandate of this Court on the Nexus point, but also, the District Court assumed two deviations from the actual facts of this particular case; first it assumed a state of facts which the record does not support, and secondly, it refused to consider facts which are clearly in the record in this case. For example, the District Court refused to consider a carefully worked out agreed fact that appellants do not knowingly use their employment at the University of Washington, through teaching, or in any other way, in attempts to bring about violent or forceful overthrow of government (R. 175). Neither the Attorney General for the State of Washington, nor the Board of Regents of the

University, or its President, possess any information indicating that any appellant, or others similarly situated, is a member of the Communist Party, or is a "subversive person," or that any appellant, or others similarly situated, has influenced anyone else to become a "subversive person" or a member of a "subversive organization." (R. 187-8). In other words, the District Court refused to consider facts which positively show that there is no nexus between appellants and others, at the University of Washington, and subversive activities in the State of Washington.

In addition, the District Court refused to consider other relevant facts. The Washington Committee on Un-American Activities made its report, significant portions of which have been conclusively shown to be false. (R 206-13), at the beginning of the 31st Washington Legislature in January 1949. Meeting in full session immediately thereafter that legislature enacted no legislation on the basis of its committee report.

At the time when that legislative session was beginning, the University of Washington was concluding its separate and immediate action to rid itself of employees, faculty and otherwise, who might have been subversive, as reported by the legislative committee. See, Countryman, *Un-American Activities in the State of Washington*, Ch. VI, "Investigation by the University," pp. 186-285 (1951). As reported by the University President, Raymond B. Allen:

> "On January 22, 1949, the Board of Regents of the University of Washington took final action in six

> tenure cases which for more than six months had been before various faculty and administrative officers and agencies. The action of the Regents consisted of the dismissal, as of February 1, of three professors and the retention of three others on two-year probation subject to the requirement that they sign and file with the President of the University affidavits that they are not now members of the Communist Party." *(Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington 11 (1949).)*

During the hearings of the legislative committee, only ten members of the University of Washington faculty of 700 full-time members were named, but not proved as being, or having been, members of the Communist Party. Thus, the record is clear that whatever doubtful nexus the frequently false Report of the Joint Legislative Fact-Finding Committee (Washington Un-American Activities Committee) may have provided between the faculty of the University of Washington and subversive activities, that nexus was eliminated by the independent investigations, conducted by the Board of Regents, which terminated in probations or dismissals of six faculty members. It is clear that, on this record, the 31st session of the Washington legislature of 1949 can not demonstrate and "convincingly show a substantial relation between the information sought and a subject of over-riding and compelling state interest." However, as the District Court failed to note, the 1949 session of the legislature enacted no "anti-subversive" legislation.

It was not until 1951, and the thirty-second regular session of the Washington Legislature, that such legisla-

tion was enacted. When the 1951 Legislature convened, Governor Langlie reminded it of the disclosures of the Washington Committee on Un-American Activities. In his message he made references to the Committee's Report, but he made no references to the University of Washington. He advised that "in light of the grave emergency which we now face, additional action must be taken immediately . . .". (Message of Arthur B. Langlie, Governor of Washington, to the Thirty-Second Legislature, January 10, 1951.) The 1951 legislative session enacted the comprehensive Washington Subversive Activities Act.

But, it was in 1955, six years after the Committee Report, that the 34th Washington Legislature, without holding any hearings, enacted the 1955 oath requirement challenged in this case. Thus, by no stretch of the imagination, can the needed nexus between the 1955 Act and "subversive activities" at the University of Washington be satisfied by the investigations of the Washington Committee on Un-American Activities during 1948, reporting in 1949.

There is no evidence in the record of any danger caused by any of the appellants, or others similarly situated, to any legitimate interest of the state which would justify the wholesale infringement, necessarily inherent in the 1955 statute, upon free expression. It is the task of the state to produce this evidence, because, as this Court has ruled, it is for "*the state convincingly* [to] *show a substantial relation* between the information sought and a subject of overriding and compelling state interest."

Gibson v. Florida, 372 U.S. 539 at 546 (emphasis supplied).

The above discussion of nexus and the burden of proof with respect thereto, has been directed toward the 1955 oath requirement. However, it is also applicable to the 1931 oath statute. There is no evidence in the record, and none has been sought to be introduced, which, in any way, would provide a nexus or a justification for the infringements upon free expression and conscience made by the 1931 statute. This statute, therefore, is unconstitutional.

We submit that the District Court not only failed to follow the mandate of this Court and thereby committed error when it made the wrong substantive decision on the nexus question, but also that it committed error in not examining the past history; that its decision on the nexus point assumed the existence of facts not found in this record and that its decision on this point ignored facts found in this record. In short, the District Court decided the nexus question presented by this case, without confronting, or exploring, the issues involved in it, although they had been fully briefed and argued. The District Court should be reversed.

There Is No Showing of an Interest of the State Which Is Overriding and Compelling

Even if there were no problems of nexus presented by this case, a constitutional problem would remain. Where state statutes seriously infringe upon freedom of expression, as in this case, then that infringement can be justified, if at all, only when the state clearly shows a substantial

interest which must be overriding and compelling. If such interest is insubstantial, or non-existent, or not compelling, then, it clearly cannot outweigh or prevail against the protection afforded by the First and Fourteenth Amendments. *American Communications Association v. Douds*, 339 U.S. 382; *Sweezy v. New Hampshire*, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539.

In this case, the 1931 oath statute is designed to promote undivided allegiance to government; and it requires that every university faculty member exhibit such fidelity "by precept and example." The 1955 oath statute likewise seeks to promote loyalty and was characterized as a "loyalty oath" statute by the District Court. The objective of both oaths is to encourage loyalty to state and national institutions, and to provide an incentive for the defense of our country. In short, it is the purpose of the oaths to protect the state against "subversive" infiltration:

> "A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching." *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 482.

But, the state here seeks to achieve its purpose by requiring professors to achieve a certain attitude and a certain prescribed state of mind. The oaths operate to discourage or suppress the utterance of certain prohibited doctrines and certain associations, not because the doctrines are dangerous, but because they have been outlawed by the Washington Legislature. Thus, this case raises a constitutional issue expressly left unresolved by this court in *American Communications v. Douds*, 339 U.S.

382 at 396, where this Court said:

> "Government's interest here is not in presenting the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced . . . Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs."

It is too clear for argument that the two Washington statutes are not designed simply to identify persons, but rather, they have been designed to outlaw certain doctrines and to rid state employment of those, otherwise fully qualified, people who refuse to execute the oaths. The statutes in question here do not allow, for example, a state employee the opportunity to say that he is "a subversive person," and thereby be identified. They require that, if anyone is to qualify for state employment, only one answer can be given: that he is not a "subversive person," or a member of a "subversive organization," and, in the case of a professor, that he will promote "undivided allegiance to government" by "precept" and "example." Thus, only members of this statutorily defined class are eligible to serve as professors at the University of Washington. Everyone else is automatically excluded from any possibility of state employment, an exclusion based on criteria, constitutionally forbidden to the state, of belief, speech and association.

Thus framed, the constitutional issue narrows itself to whether the State of Washington can properly prohibit,

as a condition of continued employment, freedom of speech, expression and association of professors, and other employees, at the University of Washington in the interest of the state in promoting what the legislature believes to be right thinking and correct attitudes on the part of its state employees, including professors. It should be clear that at least this much is necessarily involved in this case. If a state actually has this power, it becomes a monitor of thought, as it determines for its employees what is and what is not right thinking, and, in this case, the State Legislature becomes the monitor of thought and right thinking for every faculty member at a great educational institution, the University of Washington.

When it balanced the interests in this case—the interests that a professor has in academic freedom and freedom of speech, association and expression against the interests that the state has in protecting itself from its employees uttering the prohibited doctrines and engaging in the prohibited associations—the District Court ignored the balancing done by this Court in its most relevant case. *Sweezy v. New Hampshire*, 354 U.S. 234, presented this Court with statutes of New Hampshire worded identically with those defining the 1955 oath in question here; and pitting (1) the interests of a guest faculty member of the University of New Hampshire in academic freedom versus (2) the interests of a state in protecting itself from subversion. The plurality opinion of four justices, not followed by the District Court, declared:

"We do not now conceive of any circumstance

wherein a state interest would justify infringement of rights in these fields." Id. at 251.

The concurring opinion of two justices—also not followed by the District Court—held:

> "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority . . . To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy as protected by the Fourteenth Amendment, and the right of the State to self-protection." Id. at 266-267.

Thus, the joint decision of six justices in *Sweezy* balanced the interests presented in this case in favor of a professor's constitutional rights to intellectual academic freedom. Although counsel urged this view, the District Court refused to follow the *Sweezy* case.

The lower court also refused to follow this Court's pronouncement in *Barenblatt v. U.S.*, 360 U.S. 109 at 112, that academic freedom is an area of special concern:

> "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."

It is evident that the District Court, below, has failed to understand the very essence of the "balancing" test as it has been announced by this Court. In a series of cases (e.g., *Bates v. Little Rock*, 361 U.S. 516; *NAACP v. Alabama*, 357 U.S. 449; *Louisiana v. NAACP*, 366 U.S. 293; *Am. Comm. Ass'n v. Douds*, 339 U.S 382; and *Communist Party v. Subversive Activities Control Bd.*, 367 U.S.

1), this Court has set forth its view that the "balancing" test requires that a court consider a series of factors which enter upon either side of the scales, at least the following factors enter into the "balance":

1. A careful and exact definition of the nature of the legislative interest in requiring employees, faculty members and others, at the University of Washington, to execute the 1955 and 1931 oaths. This governmental interest is defined by considering at least:

A. The various laws already on the books and which deal with the subject area of subversion so as to help isolate the state's specific interest in the oath statutes, i.e.:

(1) RCW 9.81.020 making certain broadly defined "subversive activities" a felony, including a conspiracy to advocate "by any means" any act which may constitute a clear and present danger to government;

(2) RCW 9.81.030 making membership in a "subversive organization" a felony;

(3) RCW 9.81.040 disqualifying from voting, or from holding any public office, anyone who is convicted or pleads guilty under the two above statutes;

(4) RCW 9.05.010 making criminal anarchy and/or its advocacy a felony;

(5) RCW 9.05.020 making the advising or teaching, printing or circulating, or helping to organize an assembly which spreads the propriety of the doctrines of criminal anarchy a felony;

(6) RCW 9.05.030 punishing as felony every person

who voluntarily is present at an assembly where the doctrines of criminal advocacy are taught or advocated;

(7) RCW 9.05.040 making it a felony for any caretaker, janitor, agent or owner wilfully and knowingly to permit an assembly for the purpose of "advocating or teaching the doctrines of criminal anarchy" to take place on premises within his control;

(8) RCW 9.81.050 dissolving and disposing of the property of any "subversive organization";

(9) RCW 9.05.060 making any act of sabotage a felony;

(10) RCW 9.05.080 making the advocacy of sabotage a felony;

(11) RCW 9.05.100 and RCW 9.05.120 making it a felony to display emblems of seditious or anarchistic groups;

(12) RCW 9.05.150 making it a crime to publish matter "having a tendency" to incite to a breach of the peace.

The area of thinking, believing, and/or talking, publishing or urging "subversion" has been covered and recovered so many times over that the statutes of the Washington legislature are redundant to the point of hysteria. There are many, many subsequent punishments. There is no area left for the 1931 and 1955 oath statutes to occupy, other than that of being an unconstitutional prior restraint on freedom of expression, and another invasion of it.

B. The economic, political and social conditions at the University of Washington and within the State, at the

time, so far as they pertain to the issue of whether there was any danger or threat of subversion necessitating these oath statutes. This judgment would rest upon considerations, *inter alia*, whether

(1) There is significant opposition to the major political parties in the State (the Record shows none);

(2) There is military or other armed support in the State for a radical movement proposing to use force and violence (the Record shows none);

(3) There has been a past history of force and violence by the faculty at the University of Washington (the Record shows none);

(4) The Communist Party has been growing in strength in the State, or at the University, and whether it has obtained a position of leadership within the State's churches, industries, local governments, labor unions, and educational institutions (the Record is barren of such proof).

2. On the other hand, under the "balancing" tests, there must be an equally careful and exact definition of the nature of appellants' interest in free expression and conscience, and the interest of society in freedom of expression and conscience at a state university. This interest would require at least a consideration of:

A. The interest of the individual in his rights to expression and free conscience; (R. 189-218, 46-82, 21-2, 26-31).

B. The interest of the individual in his right to silence; (R. 189-218).

C. The nature of the interest of society in freedom of political expression.

D. The nature of the interest of society in free universities (R. 297-8, 299-300, 283-94, 176-84, 32-34).

3. Finally, there should be a careful and discriminating analysis of the ways in which the 1931 and 1955 oath statutes would deter or infinge upon the interests considered immediately above in 2.

It should be emphasized that the District Court, below, struck a balance against academic freedom and the First Amendment interests of appellants without anything in the record showing that, when it enacted the 1955 statute, the Washington legislature had before it, in any way, the exhibits which the state attorney general has offered this Court. Perhaps, these exhibits, of 1949 vintage, were before the legislature in 1951 when it enacted the Washington Subversive Activities Act. But, the Act in question here was enacted in 1955. There is absolutely *NO* showing that, between 1951 and 1955, there was any reason for the Washington legislature to reconsider its 1951 Subversive Activities enactment as being inadequate to meet the problems it believed it faced in 1951; and further, there is *NO* evidence showing that:

(1) The Washington legislature, subsequent to 1951, conducted any inquiry at the University of Washington; or

(2) The Washington legislature had any reason to believe that any of the employees of the University of Washington, or appellants here, between 1951 and 1955,

or at any other time, presented a dangerous threat to the State which would justify further abridging the First Amendment. (The reverse is, of course, true); or

(3) The students, ex-students or professors have been charged, or in any way involved in, any proceedings, administrative or judicial, under the 1951 Subversive Activities Act.

There is no showing in this record currently suggesting the existance of any danger to a legitimate interest of the State of Washington occasioned by appellants, and others similarly situated, at the University of Washington. On the contrary, the record contains many statements that appellants are honorable men who, in no way, use their positions to advocate the violent overthrow of government. Furthermore, the record at pages 187-8, and agreed fact 26 (R. 175), evidences that during the last seven years while the 1955 oath has been enjoined, and while the 1931 oath has not been enforced, there has been no danger of overthrow by revolution, force or violence to the State of Washington all as a result of the teachings and other activities, of appellants, and others similarly situated. During these seven injunctive years, as the record shows, no student or ex-student or faculty member has been charged in any way in any judicial proceeding with being a "subversive person," or a member of a "subversive organization" or "foreign subversive organization." Thus, it would appear that the 1931 and 1955 oaths are useless, trapping only men of conscience, witness appellants here.

The record reveals that, according to University Presi-

dent, Charles E. Odegaard, "the existing recruitment and personnel procedures practiced by the University of Washington during the past seven years, and as improved from time to time during that period, [without the 1931 and 1955 oaths] are adequate to protect the legitimate public interest in securing qualified and trustworthy personnel." (R. 178-9). These procedures contain screening mechanisms, required by University rules and regulations which show that the personnel practices at the University of Washington are adequate to protect the legitimate public interest. (R. 305-17, 279-83).

In short, the record is utterly barren of any evidence which illustrates that, between 1950 and 1955, the teaching and research staff at the University of Washington, or any other employee, does, or has, in any way, presented a clear and present danger, or any danger, to any interest of the State which could serve as justification for the wholesale invasion of First Amendment rights presented by this case.

The above considerations, inadequately explored here, all weigh in the "balance" in this case. Although the District Court, below, accepted the "balancing" test (215 F. Supp. at 447), its opinion nowhere reveals the factors, if any, that it weighed when it struck the balance against appellants, and academic freedom, in this case. We think that the lack of a careful appraisal of the relevant factors and the interests at stake, so necessary under the "balancing" test, and which were urged by counsel below, demonstrates that the District Court grossly misunderstands and misapplied the balancing test, reaching the

wrong conclusion in this case. It should be reversed. We think the correct "balancing" of these oaths is found in the following views of Mr. Justices Frankfurter and Douglas:

> "... Since the affiliation which thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, 50 Am. Hist. Rev. 1 (1944), reprinted in Schlesinger, Paths To The Present, 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." (*Wieman v. Updegraff*, 344 U.S. 183, 194 (concurring opinion)).

What Mr. Justice Douglas said in *Adler v. Board of Education*, 342 U.S. 485 at pp. 508, 509, 510 bears repeating here:

". . . Fearing condemnation (the teacher) will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled."

". . . Supineness and dogmatism take the place of inquiry. A 'party line'—as dangerous as the 'party line' of the Communists—lays hold. It is the 'party line' of the orthodox view, of conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking, she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile, pursuit of knowledge is discouraged, discussion often leaves off where it should begin."

In sum, these views set forth the basic reasons why the instant oath statutes are at war with First and Fourteenth Amendment guarantees of academic freedom and freedom of expression and conscience.

The action of the Washington legislature in enacting the test oaths in question here indiscriminately dealt with the loyalty of all state employees generally, including that of University of Washington faculty members. Its action gravely affects freedom of speech and association throughout the academic community at the University of Washington and, indeed, throughout the State. Discussions of Communism, Leninism, Marxism, in all their many variants and shadings, now become suspect, whatever their merits or demerits. The same is true of all associations with heterodox organizations or with Soviet or Chinese professors, scientists or educators. These countries and their governing ideas represent some of the most

significant intellectual force of our time. Americans must strive to study and understand them. Yet, it is impossible to study a set of doctrines without associating and being in intercourse with those persons who believe in their validity, whether they be social or scientific doctrines. Thus, if these oaths are upheld, then academic freedom at the University of Washington, in the proscribed areas, will atrophy because test oaths contradict the professorial calling. If these oaths be upheld, then the whole purpose of the First Amendment is defeated.

If a balance must be struck, then it must be in favor of preserving First Amendment rights of appellants. The value the State of Washington receives by way of protecting itself from violent and forceful overthrow of government when it seek to apply these test oaths to University of Washington teaching and research staff seems small indeed when compared with the social costs involved. On the other hand, the value of a vigorously functioning University to the State of Washington and to our Nation, appears great indeed.

We submit the District Court committed error when, without any facts in record in this case to demonstrate the state's need to infringe upon liberty at the University of Washington, it held that the interests of the State of Washington in self-preservation justified imposing these thought- and action-conforming oaths upon appellant-professors, and other employees. Clearly, truth rings loudly in the words of J. B. Bury, particularly when his words are applied to the professorial appellants in this case:

"A long time was needed to arrive at the conclu-

sion that the coercion of opinion is a mistake, and only part of the world is yet convinced. That conclusion, so far as I can judge, is the most important ever reached by men." (J. B. Bury, A History of Freedom of Thought (1913).

The Balancing Test Should Be Abandoned

We respectfully submit that the underlying concept of a "balance" of interests is fallacious, partly because there is no room in the First Amendment for such balancing, partly because even if balancing were appropriate the scales are unduly weighted if one considers the issue to be one of public versus private interest.

We recognize, of course, that these views have been rejected by the Court, though eloquently addressed by its own members in dissent (see particularly Mr. Justice Black, 360 U. S. 140-145). But just as this Court has, from time to time, overruled earlier decisions upon later reconsideration (see, notably, *Minersville School Dist. v. Gobitis*, 310 U. S. 586, overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624; and *Wolf v. Colorado*, 338 U. S. 25, overruled by *Mapp v. Ohio*, 367 U. S. 643); so we submit that it should now reconsider *American Comm. Ass'n. v. Douds*, and cases resting on it, and overrule them.

At the outset we wish to make it clear that the position we are urging upon the Court involves no dogmatic assertion of absolutes. Situations can be envisioned in which unrestricted freedom of expression might result in the denial of another basic right guaranteed by the constitution, such as the right to a fair trial. (See *e.g.* the considerations mentioned by Mr. Justice Frankfurter in *Mary-*

land v. Baltimore Radio Show, 338 U. S. 912, at 919, 920, and *cf. Bridges v. California*, 314 U.S. 252; *Pennekamp v. Florida*, 328 U. S. 331, and *Craig v. Harney*, 331 U. S. 367).

While the distinction may appear a semantic one, the proper approach, as developed at length by Frantz in The First Amendment in the Balance, 71 Yale Law Journal 1424-50, is not one of "balancing," but one of definition. In other words, the basic question posed in the context of the case at bar is whether the First Amendment protects a person's right to be silent with regard to certain kinds of speech and affiliations and, if so, then to what extent. In defining the extent of such protection the courts must, of course, consider the consequences of any rule. And, as Mr. Frantz points out in briefly mentioning this problem (*op cit.* a 1434), that process can be described as "balancing." But he persuasively demonstrates the dangers that lie in such approach.

In any case, regardless of the language used to describe the judicial process involved, it is a fundamental error to suppose that what is involved is a consideration of private versus public interests. Merely posing the problem in such terms almost produces the answer. The First Amendment does not exist to protect private interests, but to enshrine the most basic element of a democracy, namely, the importance to the community of the fullest and freest discussion of public issues, discussion which, of course, is impossible without free association, even, as this Court recognized in *Talley v. California*, 362 U. S. 60, without a measure of anonymity. Indeed, the majority of the Court

there in effect rejected the "private v. public" interest consideration which was relied on by the dissenting justices (362 U. S. at 69).

In the light of the foregoing, this Court should consider whether, in an academic context, the right to remain silent about affiliations, political, religious, or otherwise, is protected by the First Amendment at all? That the answer must be affirmative cannot be doubted in the light of this Court's various decisions. (See particularly *Bates v. Little Rock*, 361 U. S. 516, at 523; *Sweezy v. New Hampshire*, 354 U. S. 234; *Shelton v. Tucker*, 364 U. S. 479, and *West Virginia v. Barnette*, 319 U. S. 624).

This does not imply that the right is protected against inquiry by all government agents. Here there is, we submit, reason for consideration of the objectives of such agencies. For instance, an answer can be compelled in a law suit where it is deemed relevant to an issue which must be decided to the detriment of one of the parties. For there the public interest in the fair administration of justice is superior to the public interest in free association and the accompanying right not to disclose, leaving the witness to such protection as the privilege against self-incrimination might give in an appropriate case.

However, in a case such as the one at bar, where admitted invasions of the First Amendment occur, it cannot be said that the public interest in obtaining test oaths from University faculty members, and others, is so great as to outweigh the public interest in untrammeled free academic inquiry, speech and association. Yet, by using the "balancing" test, the lower court was able to balance away

the rights of professor-appellants without giving adequate weight to the public interest in free universities. We submit that the balancing test should be abandoned, at least in the area of academic freedom.

E. The District Court Upheld Indiscriminate Infringements Upon Free Expression and Conscience When the Legitimate State Interest Can Be More Narrowly Achieved By Less Drastic Means; Thus, the Lower Court Upheld an Unconstitutional Previous Restraint.

Counsel believe that the doctrine against prior restraints is easily and properly applicable to this case. It does not require this Court to engage in the same degree of balancing as does the "balancing" test, discussed above. The issue in this case, under the doctrine against prior restraints, is not whether the substantive First Amendment areas might be infringed upon by state action, but rather, whether a state might do so by using the particular *method* it has chosen—in this case by means of test oaths.

In a recent case, *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court had occasion to apply the doctrine of prior restraint, holding unconstitutional an Arkansas statute which invaded academic freedom and freedom of assembly and association. An Arkansas statute sought its justification, in the "right of a state to investigate the competence and fitness of those whom it hires to teach in its schools . . ." *id.* at 485. This interest was held too insubstantial to justify the broad invasion of First Amendment rights.

That case, like the one at bar, was tried before a three-judge federal court wherein plaintiffs in *Shelton v. Tucker*, as did appellants here, asked that the District Court de-

clare their rights under the Declaratory Judgments Act and that the District Court issue a permanent injunction perpetually enjoining the Arkansas statute. This Court granted this relief, holding that the Arkansas statute was a prior restraint on the freedom of intellectual liberty, speech and association. The Arkansas statute cast its net too broadly and indiscriminately:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, at 488.

In *Speiser v. Randall*, 357 U.S. 513, this Court, citing cases in which the doctrine of prior restraint had been applied (*id.* at 520 and 521), held unconstitutional a California statute which allowed a *privilege* of an additional property-tax exemption to World War II veterans, on the condition that they would take this oath:

> "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." *id.* at 515.

This oath in no way makes such sweeping infringements on freedom of expression as do the two Washington oaths at bar; they catch up an assistant to an assistant, or prescribe undivided allegiance.

In *Speiser*, the state offered the privilege of an additional tax exemption on the condition that the applicant execute the oath; whereas, in the case at bar, the State of

Washington offers state employment, on the condition that the applicant execute oath forms A or B. It cannot be gainsaid that, in both cases, and in *Shelton v. Tucker, supra,* the oaths in question deal with intricate and complex webbing of the freedoms which make up the First Amendment: free speech, assembly and association. In such instances, then, the constitution requires that "the *operation* and *effect* of the *method* by which speech is sought to be *restrained* must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *id.* at 520, citing prior restraint cases. The question is whether a fair method had been established. When deciding this issue

> "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U.S. 479, 488.

As demonstrated by the record in this case, there are at least two alternative, and individually selective, procedures for identifying "subversives" and eliminating them from state employment at the University of Washington. These procedures are less drastic than the oaths. These two procedures are currently in force and have the same purpose as do the oath requirements questioned in this case.

The first technique has been set forth by the Washington legislature when it enacted Washington's Subversive Activities Act, Section 12, Chapter 254, Laws of Washington, 1951, providing:

> "Every person and every board, commission, council, department, court or other agency of the State

> of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury."

This statutory provision, in force today, allows the University of Washington to use a selective approach to the problem of "subversive employees" and does not have within it the vice of a wholesale infringement on First Amendment rights implicit in the use of the two oaths. This section, considered alone, functions as a means of identification and not as a necessary technique of exclusion, and, in this way, too, it is less drastic.

The second more selective and, hence, less drastic, alternative to the problem of subversives is found in the Administrative Code of the University of Washington. It dates prior to the 1951 legislative enactment cited above. The Faculty Appointment Policy clearly establishes the fact that "subversive" persons are ineligible for appointments. Volume II of the Faculty Handbook, Chapter I, pages 19 and 20, set forth the Basic Considerations Involved in Appointments of Faculty at the University of Washington (R. 310-11):

> "The University should avoid harboring within its faculty any who are dedicated to the destruction of

our liberties and our free institutions, upon which universities depend for their effective functioning. (*id.* at 19.)

> "The Subversive Activities Act of 1951 . . . imposes a restriction upon the power of the regents to appoint or retain as a member of the university staff any subversive person . . . But, even prior to the legislative enactment of 1951, the regents, exercising the discretion vested in them by statute, had taken the position that active members of the communist party are disqualified to serve upon the University Faculty. This policy in effect anticipated the requirements of the state Subversive Activities Act." (*id.* at 20).

University President Charles E. Odegaard has stated that the existing recruitment procedures are adequate to protect the public intetrest (R 178-9). They have been improved from time to time and, during the time these oaths were not administered, because of the injunction in the prior litigation, lasting from 1955 to 1962, no "subversives" have become state employees at the University of Washington (R. 187-8). In addition, many appellants, and others similarly situated, have security clearances for top level governmental research (R. 78- 188).

The University of Washington is circumspect indeed when dealing with communists and the possibility of communism. It has adopted a policy governing guest speakers at public meetings, open only to the students and faculty. That policy not only prohibits all members of the communist party from speaking at an open meeting on campus, but it also "exclude[s] from the campus . . . speakers who are representatives of, or spokesmen for, the Communist Party." (Report of University Pres-

ident, Charles E. Odegaard to the Faculty Senate of the University of Washington, April 12, 1962.) It is inconceivable that a university administration that has gone to such great lengths as that of the University of Washington, disallowing "representatives of, or spokesmen for, the Communist Party" from appearing as guest speakers at a public meeting held on its campus, would then turn around and hire as faculty members "representatives of, and spokesmen for, the Communist Party." Such a possibility is beyond the pale of reason, and cannot seriously be considered (R. 307-17).

A third device (R. 80-1), exclusive of the above two, and exclusive of the 1931 and 1955 oath statutes, used to rid the University of Washington of "subversive professors" is the tenure code, and tenure hearings, at the University of Washington. The nature of tenure hearings with regard to the area of subversion, provided for, and used, before the enactment of the 1951 Subversive Activities Act, is demnostrated by a University of Washington official publication: *Communism and Academic Freedom*: The Record of the Tenure Cases at the University of Washington including the Findings of the Committee on Tenure and Academic Freedom and the President's Recommendations. (Univ. of Washington Press, 1949). Part III—The Anlysis made by the President of the University of Washington—is particularly relevant. It demonstrates that a state's legitimate interest in being protected from "subveresive" professors is safely guarded indeed.

"THE PRESIDENT'S ANALYSIS

"Section I

"Introduction

"In transmitting the report of the faculty Committee on Tenure and Academic Freedom I am confident that a full and fair hearing on the charges has been given. I would go further and say that the Committee had obviously extended itself to afford the respondents an opportunity to present every word and fact in their behalf which might be at all pertinent to a fair adjudication of the issues and charges involved. I should report also that the Administration aided the respondents in a material way by paying the travel expenses of, and fees to, expert witnesses called by the respondents.

"The hearings themselves were conducted in thirty-three sessions during the period from October 27 to December 15, 1946. More than sixty witnesses were heard for the Administration and respondents. Some 3,000 pages of testimony were taken at the hearings and are available in transcript. One hundred and twenty-five exhibits were introduced in evidence and are transmitted with the transcript of testimony.

"I invite your specific attention to the introductory statement of the Committee's report, pages 23 to 29, and especially to pages 27 and 28. There it is noted that the majority of the Committee finds (p. 29) that the Tenure Code does not authorize dismissal for any cause not listed in Section IV. The Administration, the complainant, contended that the listing of causes for removal, Section IV of the Administrative Code, is merely illustrative and not definitive of the meaning to be given to the term, "good behavior." The Committee states (p. 27):

"'It is strongly urged that the Committee is free to recommend dismissal on any one or more of a number of grounds not specifically listed in Section

IV, which would in the opinion of the Committee render the particular respondent unfit to remain on the faculty. The respondents, however, contended that the causes listed in Section IV are definitive and all-inclusive. A majority of the Committee is of the opinion that the latter is the correct interpretation of the Code in this respect. Three members of the Committee, Professors Benson, Goodspeed and Williams, do not concur in this finding. Their views are set forth in separate and dissenting statement in the cases of respondents Butterworth and Phillips (pp. 49-52 for Professors Benson and Goodspeed and pp. 53-54 for Professor Williams).

"I am certain that these differing opinions represent honest differences of judgment on the meaning of Section IV of the Administrative Code.

"Concerning the Administrative Code

"The Board of Regents will recall that, when the present Administrative Code was adopted by the Faculty and approved by the Administration in 1947, it was expressly stated, and so published in the *Faculty Handbook*, that:

"'The government of the University of Washington, the powers and duties of the Board of Regents, and the constitution and authority of the faculty are ordained by the following laws . . .'

"Quoted on pages 27-29 of the *Handbook* are the several acts of the legislature, specifying the powers and duties of the Board of Regents. I shall not quote the statutes in detail but refer specifically to the first paragraph, Section 4557, Remington's Revised Statutes, reading as follows:

"'The said Board shall have full control of the University and its property of various kinds, and shall employ the President, members of the faculty, assistants and employees of the institution, who shall hold their positions during the pleasure of said Board of Regents.'

"On page 30 of the *Handbook*, following recitation of the applicable laws, this statement appears under the heading, 'University Administrative Code':

"'Subject to the foregoing laws, the following code has been adopted by the faculty and approved by the President for the administration of the University.'

"Chapter No. IV of this Code, entitled 'Tenure and Academic Freedom,' deals with the matter under discussion. The Committee on Tenure and Academic Freedom is created by Part II of this chapter. The language upon which the Committee is divided appears in Section IV of Part I of this chapter which lists the reasons for removal from the faculty for cause.

"I respectfuully invite your attention to the fact that the Board of Regents never at any time specifically approved or ordered into effect the existing provisions of the Administrative Code. Rather, it authorized the Preesident, if he saw fit, to approve an Administrative Code which the faculty itself had written and recommended as regulations for the management of the internal affairs of the University. This the President did. However, the Board of Regents is by law the governing body of the University of Washington and, as such, retains clearly within its power the right to determine the conditions of employment of the faculty and staff generally.

"Therefore, I urge that the Board study the findings of the Committee with great care and in its own best judgment arrive at a conclusion as the validity of any and all findings and recommendations placed before it in these cases." (*Id.* at 83-85.)

"Section VI of this memorandum is a summary of my findings and recommendations." (*Id.* at 86.)

"Section VI

"In summary, I am satisfied that a full and fair hearing of the charges in these cases has been af-

forded by the Committee on Tenure and Academic Freedom. Subject to final briefs by counsel for the respondents and final arguments before the Board of Regents, this memorandum represents my considered judgment on the findings and the recommendations of the Committee.

"I agree with the Committee's finding of fact concerning the Community Party, U.S.A. Having established the nature and characteristics of the party as inimicable to the future welfare of the institutions of freedom of the United States, it follows that secret membership in such a party by Butterworth and Phillips disqualifies them for membership in the faculty of the University of Washington within the causes for dismissal listed in the Administrative Code—specifically on the grounds of incompetency, dishonesty, and neglect of duty.

"In the case of Gundlach, I agree with the majority recommendation that he be dismissed, for reasons detailed in Section III of this report. I feel that I am disqualified from passing judgment on the facts underlying the recommendation of Professors Gose, Rowntree, Thompson and Williams for dismissal for neglect of duty. Rather I join with Professors Benson, Goodspeed and Densmore in their minority recommendations that Gundlach be dismissed.

"In the case of Jacobs I defer to the judgment of the Board of Regents without a recommendation. I do this because of the fact that I am personally involved in an incident of falsification by Jacobs and thus am disqualified to pass judgment. I invite attention to the fact that the Committee unanimously recommends that he be not dismissed.

"I join in the unanimous recommendation of the Committee that Eby and Ethel [illegible]e not dismissed.

"In conclusion I wish to emphasize what I have said elsewhere:

"'Freedom is essential to sound education. That

> academic freedom must be maintained in any university worthy of the name is beyond question. But academic freedom consists of something more than merely an absence of restraints placed upon the teacher by the institution that employs him. It demands as well an absence of restraints placed upon him by his political affiliations, by dogmas that may stand in the way of a free search for truth, or by rigid adherence to a "party line" that sacrifices dignity, honor and integrity to the accomplishment of political ends. Men, and especially the teacher and the scholar, must be free to think and discover and believe, else there will be no new thought, no discovery, and no progress. But these freedoms are barren if their fruits are to be hidden away and denied. Men must be free, of course, but they must also be free, and willing, to stand up and profess what they believe so that all may hear. This is an important, if not the most important part of our American heritage of freedom. It is this American heritage of freedom that must be cherished and sustained by our systems and institutions of education if they are to survive.'
>
> "RAYMOND B. ALLEN
> "*President*
>
> "January 17, 1949" (*Id.* at 107-109.)

Thus, it is clear that the record in this case presents several alternatives involving more selective procedures than do the oaths. Not one of the alternatives makes the same broadside attack on First Amendment liberties. Each has provided for security measures in a fashion such that a good faith exercise of conscience or other First Amendment rights affords a hearing which may except an individual from their application. this issue would be determined by state agencies in the same manner as other factual issues. But, the 1931 and 1955 statutes fail to make

specific provision for the exceptional, the explainable, or for the man of principle.

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures is not a hardened communist, but a loyal citizen with conscientious scruples. The 1931 and 1955 statutes assure this result.

This Court has held that the state must achieve its legitimate purpose by the method having the least impact on First Amendment rights. The Washington statutes questioned in this case do not meet this constitutional test. Consequently, they are unconstitutional previous restraints on freedom of expression.

This conclusion is patently clear, and it was urged to the District Court. Although plaintiff-appellants' trial brief contained some 22 pages devoted to a discussion of the prior restraint point, and although the point was orally argued, the District Court dismissed this argument with the following inadequate paragraph:

> "As to alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination[28] or lack of frankness

and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point."

We submit that the District Court not only committed error on this point in that it reached the wrong substantive decision on the prior restraint question, but also, that it committed further error when it ignored the facts found in the record and decided this question without confronting, or exploring, the issues involved in the question, although they had been fully briefed and argued.

F. Recent Abridgments of Academic Freedom

It appears that pressures on our schools and upon our universities and colleges to become vehicles of orthodoxy have been increasing (See, e.g., 1962 enactments of Fla. Stat. §230.23, and LSA-R.S. §§2851, 2852) producing a spate of new attacks on professors and academic freedom. (See, e.g., The Lines of Attack on Academic Freedom, Part III, in MacIver, Academic Freedom In Our Time, 123-205 (1955); ACLU, Greater Philadelphia Branch, Academic Freedom: Some Recent Philadelphia Episodes (1954), and note, 42 Am. Ass'n U. Prof. Bull. 75 (1956)).

From 1945 to 1950, the American Association of University Professors had before it for consideration some 227 cases which involved academic freedom, not counting the many "situations" which are not classified as cases. Report of Committee T, 37 Am. Ass'n of Univ. Prof. Bull. 79 (1951). Later, during the decade of the fifties, legislative investigating committees heavily taxed academic

freedom. Nineteen cases have been reported, and they usually involved a faculty member who refused to answer a question, thereby stimulating an institution to undertake actions that ultimately led to dismissal. (See the chart of these cases which appears at page 16 of the Brief of the Amicus Curiae (AAUP) in *Barenblatt v. U. S.*, 360 U.S. 109 (1959)). In some of the above cases, the faculty members as well as the university administration were at fault; nevertheless, this fact does not decrease the impact of the investigations and dismissals on the "spirit of freedom" so essential for fruitful academic labor.

In addition, there were fourteen dismissals from New York City Municipal Colleges (See, 42 Am. Ass'n Univ. Prof. Bull. 71 (1956)) under a state statute which this Court later found to be unconstitutional. *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551. Furthermore, R. E. Combs, counsel to the California Senate Committee on Un-American Activities, has testified that a number of college and university presidents in California have arranged for a "clearance" from the state committee of all new faculty appointees, and, privately, to receive "derogatory information" regarding their present staffs. Hearings, Subversive Influence in the Educational Process, 83 Cong., 1st Sess. pp. 605-622 (1953). Finally, it has been estimated that approximately 500 teachers (school and university) have been dismissed between 1948 and 1958, mostly for refusals to answer questions or to execute loyalty oaths as conditions of employment. See Appendix A in Brown, Loyalty and Security: Employment Tests in the United States, 498 (1958).

One point is entirely clear: fruitful intellectual labor requires, as its necessary condition, that all faculty members be possessed of a "sense of freedom." "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234 at 250. But, in the years which have followed World War II, when intellectual liberty has been so much under attack, one study finds that faculty members are no longer strongly possessed of a "sense of freedom." Lazarsfeld and Thielens, The Academic Mind (1958). This study showed that: (a) 46% of all the teachers who were studied felt "apprehensive" about their freedom to teach and speak freely (pp. 84-85) but, a significantly higher percentage, 54%, of those teachers who were studied but without tenure felt "apprehensive" about their freedom (p. 240); (b) this "apprehension" put a "noticeable damper on the activities and opinions" of these teachers (p. 192); (c) some professors toned down their writings and did not express their full convictions and thought in their writings and avoided assigning "controversial" reference works for discussion (p. 197); (d) some teachers avoided controversial subjects in the classroom (p. 197); and (e) some teachers found that their relationships with their students were substantially impaired (p. 204 ff).

The heavy hand of attack on academic freedom has not been foreign to the University of Washington. Although some of the following facts have been discussed under the question of nexus, they bear repetition in this

section on academic freedom. In 1947, the legislature of the State of Washington created a committee to investigate "un-American activities" in the state. That committee functioned for two years, holding two public hearings, and made its report to the legislature in 1949, two years before the enactment of the Washington Subversive Act of 1951, and six years before the 1955 amendment to that Act, the constitutionality of which is challenged in this case. The second public hearing was held on the University of Washington campus starting on July 19, 1948. During the hearings, the Washington Legislative Committee investigated at least forty faculty members, including Professor Melvin Rader, appellant here. The committee unanimously, but absolutely falsely, reported to the legislature that Professor Rader did not tell the truth when he testified before the committee and falsely reported that he had been closely associated with twelve organizations officially cited as communist fronts and subversive (P-T.O. 117). A book reporting the activity of this committee, including its hearing on the University of Washington campus, has been published: Countryman, Un-American Activities in the State of Washington, 72-332 (1951).

As a result of the committee hearings, charges were filed, before the tenure committee of the University of Washington, against six members of the University of Washington faculty, charging, in effect, that certain faculty members, at that time (1949), either were, or had been, members of the Communist Party, and that they refused to admit it. In an open letter published in early

October, 1949, University President Raymond B. Allen said that:

> "... the real question before the University of Washington is whether members of the Communist Party are qualified to serve on this University faculty, and, more specifically, whether they should be disqualified on the grounds stipulated in the Code." (Quoted from Countryman, Un-American Activities in Washington, 190-191 (1951).)

The net result of the tenure hearings was that three members of the faculty were discharged by the Board of Regents, and certain other members of the faculty, who had been so charged, were required, as a condition of continued employment, to sign affidavits that they were not then members of the communist party and, in addition, they were put on probation for two years. The tenure committee hearings, the actions by the Board of Regents, and other university investigations of the faculty were concluded in 1949, two years before the enactment of the Washington Subversive Activities Act and six years before the 1955 amendment to that Act which is challenged in this case. See, Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington (1949). There can be no doubt that there were significant and substantial invasions of rights to academic freedom at the University of Washington.

> "These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread." (*Sweezy v. New Hampshire*, 354 U.S. 234 at 250.)

> "When weighed against the great harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Sweezy v. New Hampshire*, 354 U.S. 234 at 261.) (Concurring opinion.)

For further discussion see, Symposium, Academic Freedom, 28 Law and Contemporary Problems 431-671 (1963), and Note, Grounds For Removal or Suspension of Teachers, 8 So. Dakota Law Rev. 138 (1963.)

G. The Lower Court Upheld the Oaths in Issue Which Unjustifiably Infringe Upon Appellants' Constitutional Rights to Freedom of Religion, the Core of Which is Freedom of Conscience, and Thus, the District Court Must Be Reversed.

In our country, when government seeks to deal with things of the spirit, such as love of country, patriotism, and loyalty, compulsion is out of place. The promotion of righteousness by force is a very questionable procedure. The point that John Locke made about religion extends to any conviction of the spirit, such as loyalty to one's country. We submit that Locke's view lies at the very foundation of the First Amendment and should guide this Court in its decision in this case:

> "Although the magistrate's opinion be sound, and the way that he appoints be truly Evangelical, yet, if I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in against the dictates of my conscience will ever bring to me the mansions of the blessed. I may grow rich by an art that I take no delight in, I may be cured of some disease by remedies that I have not faith in; but I cannot be saved by a religion that I distrust, and

> by a worship that I abhor. . . . In a word, whatsoever be doubtful in religion, yet this at least is certain, that no religion which I believe not to be true can be either true or profitable unto me. In vain, therefore, do princes compel their subjects to come into their Church, under pretence of saving their souls. If they believe, they will come of their own accord; If they believe not, their coming will not avail them. However great soever, in fine, may be the pretence of goodwill and charity, and concern for the salvation of men's souls, men cannot be forced to be saved whether they will or no. And therefore, when all is done, they must be left to their own consciences." (Locke, *A Letter Concerning Toleration*. New York: D. Appleton—Century Company, 1937, p. 192.)

Force can compel outward observance, but not inner conviction; it will more likely turn the spirit sour than make it sweet. This is the fatal flaw in compulsory religion, compulsory loyalty or compulsory patriotism, or anything of this sort, such as loyalty oaths. If the Washington Legislature, instead of trying to isolate a professor from his society, had followed the mandate of the First Amendment and the wisdom of John Locke in the above passage, then, appellants would not be before this Court today. Instead, however, by prescribing that the 1931 and 1955 oaths are conditions of employment, the Washington legislature has chosen force, the threat of force and the threat of dismissal as techniques for obtaining inner conviction and the control over the minds of the faculty at the University of Washington. We think that the First Amendment does not allow a state legislature to make this choice, for as this Court stated in *West Virgina v. Barnette*, 319 U.S. 624, 642:

"If there is any fixed star in our constitutional con-

stellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion *or force citizens to confess by word* [precept] *or act* [example] *their faith therein.*" (Emphasis supplied.)

It is no longer open to question that the religion clause of the First Amendment is applicable to the States as well as to the Federal Government. Its applicability extends equally to the no "establishment" clause and the "free exercise" clause, both of which are invoked here by appellants. Under these clauses, state legislatures are equally forbidden to enact, or enforce, any laws respecting an establishment of religion or prohibiting its free exercise, or forcing an abridgment of conscience. *Cantwell v. Connecticut*, 310 U.S. 296; *Murdock v. Pennsylvania*, 319 U.S. 105; *Marsh v. Alabama*, 326 U.S. 501; *Everson v. Board of Education*, 330 U.S. 1; *McCollum v. Board of Education*, 333 U.S. 203; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94; *Engel v. Vitale*, 370 U.S. 421; *Pa. v. Schempp*, 374 U.S. 203.

The purposes of these two clauses combine into the great teaching of the First Amendment that when government is neutral in the field of religion and conscience that government better serves all religious interests, whatever creed may be involved, or lack thereof. If a religious leaven is to be worked into the affairs of our people, it is to be done by, and through, private individuals and groups, not by government. By reason of the First Amendment, government can have no interests in theology, rituals or "undivided allegiances," for on these matters government must be neutral. The philosophy of the First Amend-

ment is neither one of friendship nor hostility to religion or religious observances. The man of faith, and no less, the atheist or agnostic—the nonbeliever—is entitled to go his own way. If government interferes in matters spiritual, it will be a divisive force, and the First Amedment commands neutrality (*Murray v. Curlett*, 374 U.S. 203; *McCollum v. Board of Education*, 333 U.S. 203; *Torcaso v. Watkins*, 367 U.S. 488; *McGowan v. Maryland*, 366 U.S. 420; *Engel v. Vitale*, 370 U.S. 421.)

The very core of the First Amendment's guarantee of freedom of religion lies in a deep respect and protection for freedom of conscience of each human being subject to that Amendment. The purpose of the First Amendment's religious clauses is to protect conscience from governmental invasion. (See, Madison's Memorial and Remonstrance Against Religious Assessment, annexed as Appendix to *Everson*, 330 U.S. at 63.)

What a man thinks or believes, and his inner allegiances and their reasonable outward manifestations, are of no concern of government. A union of government and religion tends to destroy government and to degrade religion.

> "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." (*West Va. v. Barnette*), 319 U.S. 624, 636-7.)

Advocacy, academic inquiry and belief go hand in hand. There can be no true freedom of religion, freedom of

mind or freedom of conscience if thoughts and their expressions are pent up. Yet, all appellants are fearful that if they be required to execute Oath forms A or B, they will subject themselves to harrassment and the threat of perjury (See R. 188). They are all of the opinion that they cannot execute the oaths without emotional anguish due to having to compromise their "principles, beliefs and consciences." (R. 188.) They all consider the oaths in question to be an affront to their consciences and to their personal and professional integrity. (R. 188.) We believe this Court foresaw this case when it said that: "The First Amendment gives freedom of mind the same security as freedom of conscience." (*Thomas v. Collins*, 323 U.S. 516, 531.)

Two appellants, Professors Matchett and Orians, are members of a religious order known as the Society of Friends (Quakers) (See R. 189). To them, religion is a matter of individual conscience and this Order is well known for its pacifism and respect for the individual consciences of all men everywhere. The Quakers, or Friends, are a well-known religious denomination which rejects all institutionalized or collective prayer. In the "Epistle to the Reader" prefixed to the "Great Mystery," of George Fox, the founder of the Quaker movement, Edward Burrough, who became a Quaker in 1652, wrote (cited in Hastings, *Encyclopedia of Religion and Ethics* (1941) Vol. VI, p. 143):

> "In all things we found the light which we were enlightened with all . . . and so we ceased from the teachings of all men, and their words and their worship and their temples and all their Baptisms, and

> their Churches . . . and we met together often, and waited upon the Lord in pure silence, from our own words and all men's words and hearkened to the voice of the Lord . . . and while waiting upon the Lord in silence as often we did for many hours together . . . we received often the pouring down of the spirit upon us and we spake with new tongues, as the Lord gave us utterance and as his spirit led us . . ."

Appellants, Matchett and Orians, are devoutly of the conviction that their sole and undivided allegiance must be to their God and through their God to peace for all men, everywhere—East as well as West—and not to any government, good, bad or indifferent. They consider that were they to take these oaths they would contribute to their own spiritual undoing (R. 189). Thus, the 1931 and 1935 oath utterances are forbidden to them. If these oaths be taken literally, they require that these two appellants "by precept and example" not only utter words and commit acts in which they do not believe, but which contradict their religious scruples. It is well known that the Quakers, and appellants Matchett and Orians, are pacifists who have long held the view that war and the current nuclear arms race are immoral. Yet, the 1931 oath demands that they, by *precept* and *example*, promote an *undivided allegiance* to the "*government of the United States*" which is heavily engaged in the nuclear arms race. The 1955 oath disallows them speech and association with Communist Chinese, Russians and others, people with whom Matchett and Orians are directed by their religious principles to love, nurture and associate. The oaths, therefore, require them to contradict and abandon their religious principles.

Appellants here have standing to raise this issue, and have done so. Measured by First Amendment standards, and considering them in light of the record, we submit here, as in the court below, that the oaths in question cannot stand. After stating that appellants had challenged the 1931 and 1955 oath statutes on freedom of religion and conscience grounds (215 F. Supp. at 444) the District Court, below, did not rule upon appellants' contentions. We think the District Court should be reversed.

The No-Establishment Clause

Five times within the past fifteen years this Court has spelled out the meaning of the no-establishment clause. In four cases, this Court defined this clause in substantially identical language: (*Everson v. Board of Education*, 330 U.S. 1, 15-16; *McCollum v. Board of Education*, 333 U.S. 203, 210-211; *McGowan v. Maryland*, 366 U.S. 420, 443; *Torcaso v. Watkins*, 367 U.S. 488, 493):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

If anything can safely be said to be settled in constitutional law, it is that the First Amendment's no-establishment clause means what the above quoted words say. The Fifth case, *Engle v. Vitale,* 370 U.S. 421, in part, goes to a slightly different aspect of the meaning of the establishment clause, but it reaffirms the view cited above.

The two clauses of the First Amendment join in a common purpose. In most cases, the clauses are fungible. Nevertheless, they are not identical in every respect:

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, *does not depend upon any showing of direct governmental compulsion* and is violated by the enactment of laws which establish an official religion *whether those laws operate directly to coerce nonobserving individuals or not. (Engle v. Vitale,* 370 U.S. 421, 430-31, and see *Pa. v. Schempp,* 374 U.S. 203 at 256, note 21.)" (Emphasis supplied)

A Distinction Between the No-Establisment and Free Exercise of Religion Clauses

This Court might choose to follow a distinction suggested by some of the cases cited above. See *Everson, McCollum, McGowan* and *Torcaso.* The distinction is that: If compulsion is exercised to impel participation in *religious* conduct, it constitutes a law respecting an establishment of religion as well as one prohibiting the free exercise thereof. If, on the other hand, it impels partici-

pation in *secular* conduct, it can only be a law prohibiting the free exercise of religion.

Should this Court choose to follow this distinction, characterizing the 1931 and 1955 oaths as "secular," then we submit the two oath statutes are unconstitutional as to all appellants, and others similarly situated, in that they prohibit their free exercise of religion and consciences and force them to abridge their consciences, and that this is particularly true of appellants Matchett and Orians.

As the cited cases state, it would be a violation of the establishment ban to "force . . . a person to go to . . . church . . . or . . . to profess a belief or disbelief in any religion." Going to church and professing belief in religion are obviously religious acts and coerced participation establishes religion no less than it prohibits its free exercise.

On the other hand, non-polygamous marriages (*Reynolds v. United States*, 98 U.S. 145); military training (*Hamilton v. Regents of the University of California*, 293 U.S. 245); vaccination (*Jacobson v. Massachusetts*, 197 U.S. 11); saluting the American flag and pledging allegiance to it (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624); abstaining from labor one day weekly (*McGowan v. Maryland*, 366 U.S. 420) are all deemed to the general community and the courts to be secular rather than religious matters and compulsion with respect to them does not violate the ban on establishment of religion, although it may (or may not) violate the ban on laws prohibiting the free exercise of religion.

An examination of the *Barnette*, *Everson*, *McCollum*, *McGowan* and *Torcaso* cases, *supra*, will illustrate the distinction. In *Barnette*, this Court held that students, children of Jehovah's Witnesses, could not be compelled by public school authorities to participate in the flag salute ceremony. Such coercion, it was held, prohibited the free exercise of their religion in a manner forbidden by the Constitution. Since, however, the ceremony is generally deemed a patriotic or secular one, rather than a religious one, there was no suggestion that the public school authorities were required to discontinue it as part of the regular public school program because a child could be given permission not to participate. Not so with the oath statutes here.

In *Everson*, this Court, by a vote of 5 to 4, upheld the use of public funds to transport children by bus to private and parochial schools. The majority held that this was secular conduct whose purpose it was to protect children from the hazards of the road. (This Court interpreted the challenged statute to apply to all private schools, secular as well as religious.) Hence, there was no violation of the establishment ban, even though the public funds so expended were raised by compulsory taxation of citizens.

In *McCollum*, the conduct complained of was clearly religious. Hence, the Court did not issue a judgment which would simply have secured the right of the plaintiff's child not to participate in the religious program, but decreed that the conduct should be discontinued and eliminated.

In *Zorach v. Clauson*, 343 U.S. 306, not mentioned above, a majority of this Court held that the gravamen of the plaintiffs' complaint was that public school sessions continued while off-premises religious instruction was taking place. Under this analysis of the case, the Court held that there was no violation of the establishment ban since the conduct—continuation of secular instruction—was purely non-religious.

In *McGowan*, the majority of this Court held that the present purpose of the challenged Sunday laws was to assure a common day of rest, recreation and family togetherness. This is obviously a secular purpose and the laws were therefore held not to violate the non-establishment clause.

In *Torcaso v. Watkins*, on the other hand, the purpose of requiring affirmation of a belief in the existence of God was clearly and exclusively religious. Hence, the Court held it beyond the competence of the State under the First Amendment.

The distinction is a critical one. For if the act is secular it is within the constitutional competence of the state, and therefore the sole question remaining is whether a particular religiously-motivated person has a constitutional right under the free exercise clause to be excused from participating therein. (This, according to a bare majority of this Court, depends upon the balancing of the secular needs of the community against the religious rights of the individual.) On the other hand, if the conduct is religious, then it is outside the competence and jurisdiction of the state or its instrumentalities, and even if participation

were not compulsory the conduct would be unconstitutional.

The Free Exercise of Religion Clause

It follows from this analysis that the appropriate remedy will differ in the two types of cases. If only free exercise is involved in that the conduct is secular, i.e., the taking of the two oaths, then the sole right of the religiously-motivated dissenter is to be excused from participation. The practice is to be discontinued only if there is no possibility of excuse. Conversely, if establishment is involved in that the conduct is religious, the constitutional redress is not to excuse the dissenter but to discontinue the practice (for the state has no constitutional power to enter into it in the first place).

In the case at bar, the statutes are summary. They do not afford the opportunity for a religious or conscientious objector, to be excused; nor do they offer him the opportunity to explain, defend or justify his refusal. Instead, the statutes operate summarily, or after a sham hearing, where no justification for refusal can be accepted, and therefore they operate arbitrarily, invading the First Amendment's guarantee of freedom of conscience and freedom to exercise one's religion. The 1931 oath statute expressly declares that appellant's contracts are void; there is no alternative. There is no way to excuse a person or to discontinue the practice with respect to this statute; consequently, the 1931 statute must be declared, and is, unconstitutional. The 1955 statute requires that faculty members, with and without tenure, execute the

oath as a condition of continued employment. There is no alternative, and it, too, is unconstitutional.

We submit that there is no privilege of non-participation. The statutes do not so admit. Nor does a realistic assessment of the situation honestly afford a choice. The challenged oaths are not immune from invalidation under the free exercise clause of the First Amendment. A professor's free conscience is at stake, as are his tenure rights, his livelihood, his reputation and his credit standing. To say there is no coercion here is to indulge pure fiction. In Constitutional Law:

> "It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test." (Mr. Justice Hughes in *Electric Bond & Sec. Co. v. SEC*, 303 U.S. 419, 440.)

Non-physical coercion is well recognized in Anglo-American law. The concepts of "undue influence" in equity jurisprudence and the law of wills and testaments are illustrations of every-day applications of the principle that psychological coercion can be as effective in reality and as amenable to redress in law as physical coercion. A psychologically coerced confession is as inadmissible in a criminal case as one procured through physical force. (*Chambers v. Florida*; 309 U.S. 227; *Malinski v. New York*, 324 U.S. 401; *Leyra v. Denno*, 347 U.S. 556.)

In the area of the relationship of church, state and conscience there is ample authority for giving judicial recognition and legal effect to non-physical coercion. In the *Everson*, *Engle* and *McCollum* cases, the Court stated that under the First Amendment a state may not only not

"*force*" a person to participate in a religious act or profess a religious belief, but it likewise may not "*influence*" him to do so. This view has long been held. (See: *Tudor v. Bd. of Ed.*, 14 N.J. 31, 100 A.(2d) 857, cert den. 348 U.S. 816; *People ex rel. Ring v. Bd. of Education*, 245 Ill. 334, 351; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 199-200.)

> "Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good or bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include the power to amend. Hence, validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question." (*West Va. v. Barnette*, 319 U.S. 624, 634.)

The statutes requiring the 1931 and 1955 oaths cast their nets too broadly and are well beyond the power of a state legislature. The command of the First Amendment that there shall be no law establishing or prohibiting the free exercise of religion must prevail:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach

> of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections." (*West Va. State Bd. v. Barnette*, 319 U.S. 624, 638 (1943).)

The decision of the District Court, below, should be reversed.

II.

The District Court Upheld the 1931 and 1955 Enactments Although Said Enactments Infringe Upon Freedom of Expression Without Affording a Hearing, and Although They Shift the Burden of Proof; Each of Which Is In Violation of Due Process of Law.

A. The Lack of a Hearing

The District Court's opinion clearly indicates that this question was troublesome: "As in the prior litigation arising out of this statute, the question whether or not an employee who refuses to subscribe to the loyalty oath will be afforded a hearing prior to discharge presents a substantial issue of due process."

But, instead of deciding this question, the lower court assumed it away by assuming the existence of facts not found in the record and without exploring the issues this question presented, and without considering, indeed ignoring, the expressly stated policy of the Washington legislature, the Board of Regents and the Washington State Supreme Court on this point. The District Court held: "The fact that refusal on any ground is declared to be cause for immediate termination of employment does not close

the door to hearing and inquiry; nor does it preclude the exercise of administrative discretion if it should appear that the refusal to sign the oath is in no way related to a willful refusal to make disclosure as to whether or not the employee is a member of a subversive organization. . . . As was pointed out earlier in this opinion, in this declaratory judgment proceeding the dismissal policies and hearing procedures which would actually be put into effect by the University administration under the statute and/or under its own rules and regulations are a matter for speculation. On the showing here made this court will not presume that the defendant state officials will act arbitrarily or in disregard of constitutional rights of public employees, but this court must assume that the statute will be administered and applied in a constitutional manner.[49]" (215 F Supp. at 451 and 452.)

We submit that state policy on this point is not a matter for speculation.

State policy on this matter has been established. Facts occurring subsequent to the date this Court declined jurisdiction in *Nostrand v. Little*, 368 U.S. 436, close the door to effective hearing and inquiry. They show that the infringement upon freedom of expression is without a meaningful hearing afforded to any employee at which he could explain or defend his refusal to execute the oaths. This is the state policy declared by the Washington legislature, and followed by the Board of Regents and the Washington Supreme Court, and which was ignored by the lower court. It will be demonstrated as follows:

On or about May 25, 1963, as shown by a memorandum

from President Odegaard (R. 169, 176) which in part, demanded that appellants execute the oaths in question in this case, and which they have refused to sign, the Board of Regents of the University of Washington adopted the following statement relative to those faculty members having tenure who should not sign the proffered oath:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination of employment, and appeal to the tenure committee, it *should be indicated that the grounds for termination are failure to comply with a provision of Washington State law which is binding upon the Board of Regents.*
>
> "Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:
>
> "'The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.
>
> "'They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents, as defined in the laws of the State of Washington.'
>
> "In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow customs on tenure described in Chapter 25 of the Faculty Code. The Board, *however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington, and, therefore, cannot waive requirements as to employment specifically set by law*

with reference to the execution of the statement and oath." (Emphasis supplied.)

This statement by the Board of Regents evidences that it adopted a new ground for dismissal of tenured faculty: failure to execute the oaths here in question. In meeting the responsibilities and obligations imposed upon the Board by the Laws of the State of Washington (including Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955), it cannot waive the requirements of the acts in regard to the execution of the oaths; and thus the customs affecting professors with tenure, as described in Chapter 25 of the Faculty Code, cannot and will not be followed. In short, any tenure hearing would be a sham because no explanation or justification for refusal to sign the oaths could be accepted. Yet, these very rules and regulations, before amendment by the Board of Regents were relied upon by the Supreme Court of the State of Washington (and as set forth in the appendix to the decision of *Nostrand v. Little*, 58 Wn.(2d) 111, at 135-137) as affording a hearing to Professors Nostrand and Savelle, holders of tenure. At page 131 the Washington court held:

> "We are of the opinion that the provision, in the subversive activities act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract is deprived of the right to a hearing as provided in the rules and regulations of the University. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing

before the tenure committee and to the other procedures relating to termination of employment prescribed in the University's rules and regulations, set forth in the appendix to this opinion."

The ruling by the Board of Regents accords fully with the intent of the Washington legislature as it is revealed by the structure of the oath statute itself. Section 1 of Chaper 377, Laws of the State of Washington, 1955 (RCW 9.81.070, the statute under scrutiny), provides that refusal to execute the anti-subversive oath *"on any grounds* shall be cause for *immediate termination* of such employee's employment" (Emphasis supplied). RCW 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. These two sections can have only one meaning—ignored by the District Court—that no matter what reason an employee has for belonging to a "subversive organization," nor what is the nature of his association therewith, or the purpose thereof, nor why he is unable or unwilling to execute the oath, nevertheless, he is subject to immediate and automatic discharge without any realistic opportunity to be heard or to explain his refusal to execute the oath. There are no exculpatory grounds.

If there were no possible explanation or defense for a refusal to execute the oath, or for affiliation with a subversive organization, then it might be said that hearing and notice would be unnecessary because such refusal or affiliation would be an inevitable concomitant of unfitness or disloyalty. It takes little imagination, however, to picture a number of situations which would cause a professor at the University to refuse to sign this oath and

which situations would in no way reflect on the employee's loyalty or fitness for the job. The professor might be associated with a subversive organization for counter-espionage purposes in connection with either governmental or patriotic organizations. He might belong for the purpose of sociological study of "fringe organizations" or to satisfy his personal intellectual curiosity as to the functioning of such organizations, or he might belong solely to get the benefits from the wholly lawful aims of the organization or to assist in such lawful aims, while eschewing its disloyal aims. (Cf. *Scales v. U.S.*, 367 U.S. 203; *Bridges v. Wixon*, 326 U.S. 135.)

In none of these situations should his membership reflect in the slightest degree on his loyalty or on his fitness for employment. Thus, even knowing membership in a subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. And yet his membership, under the statutes at bar, would either (1) be the basis for his refusal to take the oath and thus incur immediate dismissal from State employment under Section 1 of the 1955 Act, or (2) would require a false statement under oath that he is not a member of the subversive organization which in turn would disqualify him for public employment pursuant to RCW 9.81.060, and qualify him as a target for a perjury action. There is no middle ground.

Moreover, by now it has been clearly demonstrated that such a "disclaimer oath" is exceedingly offensive to a large and respectable segment of our citizenry. A number of universities have refused substantial student scholarship

grants under the National Defense Education Act of 1958, solely because this Act requires a student-applicant to execute an oath very similar to the oath prescribed by the Washington State Statute. (R. 184.) Both individually and through such representative organizations as the Association of American Colleges, the Association of American Universities, the American Association of Land Grant Colleges and State Universities, the National Association of State Universities, the American Association of University Professors, and the Association for Higher Education of the National Education Association, the colleges and universities of the United States have vehemently protested this affidavit requirement in the National Defense Education Act and have urged its repeal. (See Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959.) And, finally, Congress has repealed it. If the taking of an oath, such as the ones under scrutiny, is so deeply offensive to such an important segment of our society, it is reasonable to assume that the Washington disclaimer oath will be refused by at least some loyal and worthy citizens, such as appellants in this case, simply because of its offensive and insulting nature. And yet, such a refusal "on any grounds" shall be cause for "immediate termination" of employment. No meaningful opportunity is afforded a State employee, appellants here, to explain or defend his failure to execute the oath or his affiliation with a "subversive organization." And, under Washington statutes and the above University rulings, no reasonable explanation justifying a refusal to execute the oaths can be accepted as an exculpatory ground.

"If he declines to sign, the employee is subject to immediate discharge." *Nostrand v. Little*, 58 Wn.(2d) 111 at 125, and see discussion in Murphy, An Emerging Constitutional Right, 28 Law and Contemp. Probs. 447 at 479-81.

The Washington Supreme Court has expressly declared state policy which stimulated the ruling by the Board of Regents on May 25, 1962, discussed above. That court has determined that if a tenured professor should request a hearing and refuse to execute the oaths, then he should be dismissed solely for that reason. Thus, the hearing afforded tenured professors is a sham. The Washington Court, twice, has declared state policy on this point. In *Nostrand v. Little, supra*, at page 131 the Washington Court said: "If he does not wish to sign the oath, he may seek private employment." This statement is simply an affirmation of the position of the Washington Court in its earlier case involving these statutes:

> "Respondents [Professors] are not compelled by section 12 [the section requiring the 1955 oath] to do anything. But if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, and *their refusal to do so renders them ineligible for further employment*" (emphasis supplied). *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477, also see p. 483.)

The Washington Supreme Court has indicated that non-tenured professors are not entitled to a hearing. It has been very careful to limit the areas in which hearings would be granted, limiting these areas to persons holding tenure or civil service rights. At page 123 in *Nostrand v. Little, supra*, it stated:

> "This court has very recently held in *Yantsin v. Aberdeen*, 54 Wn.(2d) 787, 345 P.(2d) 178 (1959), that, in the absence of civil service or other tenure rights, public employees may be discharged by their employers without any reason being assigned therefor. . . . Since the power to discharge is absolute except for such tenure rights, the discharged public employee is not entitled to a hearing regarding the reason for his discharge."

There can be no question argued regarding the Civil Service Act. This act is RCW 41.06. That statute is clear in that the non-tenured appellants in this case are not entitled to a hearing under the State Civil Service Law. Non-tenured employees would include both non-tenured faculty and certain other employees of the University having no teaching responsibilities. Section 7 of that Act clearly provides:

> "The provisions of this act do not apply to . . . (3) Academic personnel of the institutions of higher learning and other such positions as are exempted under section 5 of this act; . . ."

The other exemptions in Section 5 include students, part-time or other temporary employees, and "part-time professional consultants." Thus, clearly all non-tenured appellants in this action are not afforded a hearing by the Civil Service Act.

In addition, the Washington court also decided other questions relating to state law and which had been argued in *Nostrand v. Little*, *supra*, by the Attorney General to govern the professors' right to a hearing. This holding is extremely significant for the appellants in this case who are non-tenured and thus, receive no hearing under the

tenure code. The Washington Supreme Court stated that the Administrative Procedures Act has no application to the University of Washington regarding the execution of the oaths in this case:

> "The regents have urged, in their reply brief, that the professors are entitled to a hearing under the model state administrative code (Laws of 1959, chapter 234, RCW 34.04.010 et seq.), citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445. However, we are of the opinion that this 1959 statute was not intended to supersede established procedure adopted by the regents pursuant to RCW 28.77.120 and 28.77.130. There is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years."

This Court, in many circumstances, has had to look behind an administrative hearing or trial to see whether it has been a hearing in fact. If this Court finds that only a sham hearing took place, where a real hearing is required, then, it has struck down the results of the sham hearing as a violation of due process of law. See, *Moore v. Dempsey*, 261 U.S. 86, (mob-dominated trial); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, (no real trial of issues in a civil suit); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, (immigration hearing board failed to exercise its statutory discretion due to acts of Attorney General); *Tumey v. Ohio*, 273 U.S. 510, (Pecuniary interest of Judge in result of trial); *Powell v. Alabama*, 287 U.S. 45, (court-appointed counsel found not to have been adequately representing defendant); *Thompson*

v. Louisville, 362 U.S. 199, (lack of evidence made conviction a denial of due process).

In this case, the alleged hearing, based solely on the issue of whether or not the professors have signed the oath, has a predestined outcome since their failure to sign the oath will itself be the occasion for its being, and the irrebuttable evidence sufficient for dismissal. The "hearing" is consequently a meaningless act and will not serve to protect the tenured professors' rights. There is no possibility of any tenured professor advancing any ground, however reasonable, which might justify his refusal to take the oaths. This sham hearing in the case of tenured professors, and the even more summary dismissal of the non-tenured professors, constitutes arbitrary action of the state under the doctrine of *Slochower*.

In *Slochower v. Board of Education of New York*, 350 U.S. 551, this Court pointed out that, even though "a person does not have a constitutional right to government employment," his dismissal "must comply with reasonable, lawful, and non-discriminatory terms" (p. 555). In the majority opinion in that case, Mr. Justice Clark stated:

> "... *Adler v. Board of Education*, 342 U.S. 485, 96 L.ed. 517; 72 S. Ct. 380, 27 ALR (2d) 472, upheld the New York Feinberg Law which authorized public school authorities to dismiss employees who, *after notice and hearing*, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise, *Garner v. Board of Public Works*, 341 U.S. 716, 720, 95 L.ed. 1317, 1322, 71 S. Ct. 909, upheld the right of the City to inquire of its employees as to matters that may prove relevant to their fitness and

> suitability for public service,' including their membership, past and present, in the Communist Party or the communist political association . . ." (Emphasis supplied.)

In both *Adler* and the *Garner* cases, the employee was afforded an opportunity for a hearing at which he could explain his position and defend himself from any implications of disloyalty or unfitness.

Later, at page 559, in the *Slochower* case, this Court held:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continual employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. *We hold that the summary dismissal of appellant violates due process of law.*" (Emphasis supplied.)

The statutes requiring the "1931 oath" and those requiring the "1955 oath," in the case at bar, are as summary and therefore as unconstitutional as was the charter provision struck down in *Slochower*.

Both the Washington State Supreme Court earlier, and, in the case at bar, the District Court, tried to uphold the 1955 statutory requirement on the ground that it constituted an investigation of the qualifications (including loyalty) of state employees. However, the procedures involved in this case are very definitely not investigative, but constitute an arbitrary prerequisite for obtaining or continuing to hold state employment. No employee is

allowed to give information; instead, he must give the right answer. The automatic and summary manner of dismissal for failure to give the right answer points up the conclusion that this requirement is not an inquiry into the fitness of the employee, or into his loyalty, or a search for information, but is purely a punitive step designed to penalize those who will not or cannot take the oaths.

Perhaps this requirement might exclude some disloyal or otherwise unfit employees, but at the same time it also excludes loyal and fit employees without recourse and/or an opportunity to show their loyalty and fitness. Since indiscriminate classification of innocent with knowing activity offends due process, *Wieman v. Updegraff*, 344 U.S. 183, a meaningful opportunity must be afforded the employee to prove his innocence despite membership in a subversive organization or refusal to take the oath. Such an opportunity is not only lacking in this case but is expressly prohibited by the use of the words "on any grounds" in the statute. This violates the fundamentals of due process of law, and error was committed by the District Court in not so holding.

The 1931 statute operates even more summarily:

> "Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void."

The District Court fully agreed that the statute is clear

and agreed that the operation of the 1931 statute is summary:

> "In view of the mandatory language of the statute there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit that the District Court committed further error, and abuse of discretion, when it declared that the 1931 statute is clear and that it operates automatically, but failed to declare it arbitrary, and hence, unconstitutional as a deprivation of a due process of law.

B. Shifting the Burden of Proof.

Speiser v. Randall, 357 U.S. 513, was a case in which this Court struck down a California oath, less drastic in breadth than the ones questioned in this case, and which was required before property owners could qualify for a tax exemption. This Court held that since the oath infringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer" (*id.* at 529), then, it constituted a violation of due process of law. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure," namely, execute the oath as a condition of obtaining a tax exemption. The procedure was invalid, placing an unconstitutional burden on free speech, and because of this, appellant could not be denied a tax exemption for failure to execute the oath—for refusing to take the first step in an invalid series.

We submit that *Speiser v. Randall* applies to this case in at least two ways. On the one hand, appellants here have been demanded, as they were in *Speiser*, to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive appellants of due process because neither the 1931 nor 1955 statutes offer a hearing as pointed out above. There can be no doubt of the burden on free expression in this case.

On the other hand, we submit that in the case at bar, as in *Speiser*, there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss of employment, etc., achieving the same practical, but constitutionally forbidden, result: The deterrence of free expression which was disallowed in *Speiser*. In that case this Court, at page 526, stated:

> "The vice of the present procedure is that, when particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, Cf., *Dennis v. U.S.* , provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not

command directly. It can only result in a deterrence of speech which the constitution makes free."

The 1955 oath clearly places the burden of persuasion and proof onto appellants, necessarily resulting in a deterrence of speech which the Constitution makes free. It presumes the guilt, and non-employability of all state employees, appellants here, presuming either that they advocate the prohibited doctrines or that they are members of the prohibited organizations. If and only if an appellant comes forth and executes the expurgatory oath will he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and the disloyal. In other words, the oath presumes non-employability and then shifts onto appellants the task of understanding the complex statutory definitions of subversion and then requires appellants to make their declarations, only one answer of at least three possible ones being acceptable.

Nor is this the end of the matter. If appellants execute the 1955 oath, there remains under Washington statutes the possibility of further interrogations, conducted pursuant to the 1951 Washington Subversive Activities Act, and in which appellants are under statutory requirement, on pain of loss of employment, to come forth, under oath, and further to prove the negative of these complex statutory definitions, and otherwise satisfy their inquisitor. Thus, in this case, as in *Speiser*, the burdens of proof and persuasion are placed on appellants throughout the procedure.

But, even so, there is yet another hurdle for the profes-

sorial appellants here. They must execute, annually, still another oath, the 1931 oath of undivided allegiance, in order to qualify for their professorial jobs. If they execute the 1955 oath but refuse to execute the 1931 oath, then, the 1931 statute operates summarily, making their teaching contracts "null and void." This total procedure clearly constitutes an unconstitutional burden on free expression and is unconstitutional under *Speiser v. Randall.*

It is no answer to argue—as the District Court did—that *Speiser* does not apply because the oath statutes, as applied in this case, serve to protect the State from an evil sufficiently grave to justify the infringements upon free expression. The lower court's position is defective because the record in this case fails to reveal, as pointed out above, any nexus between appellants and any evil; and further, it is barren of any showing of a subordinating state interest which is compelling. These are the burdens for the State, appellees here, to show. In addition to this error, the District Court committed another: it failed to follow this Court's analysis in *Speiser.* In *Speiser* this Court held inapplicable the principles of *Garner v. Board of Public Works,* 341 U.S. 716; *Gerende v. Board of Supervisors,* 341 U.S. 56, and *American Comm. Association v. Douds,* 339 U.S. 382, for the reason that in those cases "the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath, he retained his position." It is clear, as shown above, that even though appellants were to execute the oaths here, that act alone would not be conclusive evidence: further loyalty proceedings are expressly authorized under the 1951 Act which has been incorpo-

rated into the administrative code of the University. Nevertheless, the District Court cited the cases above, distinguished by this Court in *Speiser*, and then held that, because of the applicability of those cases, "*Speiser* is therefore not controlling."

We submit the lower court committed error and abused its discretion when it dismissed appellants' complaint with prejudice in full recognition of the facts that the statutes here in question shift the burdens of persuasion and proof, without a hearing, and therefore, in violation of due process of law. We submit this erroneous ruling is material, and that the District Court should be reversed.

III.

The District Court Upheld the Oath Statutes in Question Here Even Though They Infringe Upon Freedom of Expression in That They Use Terms Which are Vague, Fluid and Indefinite, in Violation of Due Process of Law.

In a series of cases, this Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or to command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at their meaning and to differ as to their applications. *Winters v. New York*, 333 U.S. 507, and *Lanzetta v. New Jersey*, 306 U.S. 451, and cases cited therein. Moreover, the doctrine prohibiting unconstitutional vagueness gives additional protection to the several freedoms established by the First Amendment. *Winters v. New York, supra*, and see Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960).

Thus, this Court, in *Smith v. California*, 361 U.S. 147 at 151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

This Court has indicated that an oath, less sweeping in its infringement upon free expression than the one required by the 1955 statute, had a potentially inhibiting effect on speech. *Speiser v. Randall*, 357 U.S. 513. Furthermore, this Court has held that the doctrine announced in *Smith v. California, supra*, is fully applicable to oaths which a state may require as a condition of employment. *Cramp v. Florida*, 368 U.S. 278 at 284.

In striking down the vague statute presented by *Winters v. New York*, 333 U.S. 507 at 518, this Court appears to have forecast the advent of this case when it said:

> "The next [case] may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

Thus, it is clear that strict standards against vagueness should be applied in this case involving as it does the penal definitions of "subversive persons" and "subversive organizations," and the threat of a perjury prosecution of professors at a great American University devoted to academic freedom and political expression. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234.

Nevertheless, the District Court, invoking the canon of "reasonable construction"—something it inconsistently re-

fused to do with the vague portions of the 1931 oath—upheld the 1955 oath:

> "It is our view that a reasonable construction of the statutory language does not leave the meaning uncertain or vague—in any event not to the extent that the statute must or should be held unconstitutional in an action such as this. The words used are to be understood in accordance with the ordinary meaning of the words in current usage."

To determine the ordinary meaning of the Washington Statute, the District Court reproduced portions of Webster's New International Dictionary (2nd ed.). As was done in *Lanzetta v. New Jersey*, 306 U.S. 451 at 456, we set forth the oath required by the 1955 statute. The words in brackets are the words which the District Court held to supply meaning to the word immediately preceding the bracket, and, in the view of the District Court, thereby render that word, and the complete oath, clear and not a subject for speculation, or unconstitutional vagueness.

On the pain of loss of employment, or subsequent perjury prosecution, a professor must now swear that he *understands* the following:

> "Subversive person means any person who . . . advocates, abets [incites, encourages, instigates or countenances; in a disparaging sense] advises or teaches by any means [in any way; possibly, or at all] any person . . . to aid in the commission of any act intended . . . to assist [to lend aid; to help] . . . in the alteration of the constitutional form of government . . . by revolution, force or violence . . ."

We submit that the opinion of the District Court in no way clarifies or makes certain the oath, but rather, its opinion makes the oath broader and the meaning of the

oath more fluid and obscure than previously, and that the lower court committed error when it upheld the existence of this vague and fluid oath, because in its entirety, as well as in its several words, it infringes upon freedom of expression in violation of the doctrine set forth in *Smith v. California, supra,* and, in light of the threat of perjury, the oath insures that the dissemination of ideas will be the loser. Thus, we submit that unconstitutional vagueness is presented by this case and that each and every definitional section of the 1955 oath is unconstitutional and should not be applied to appellants. (See, R. 67-9, 188, 195-6, 197, 215-18.)

To test the meaning of the 1931 oath, to establish its unconstitutional vagueness and uncertainty, and to expose it to the purity of language and concept, we here set forth the oath once again, giving definitions of its key words from *Webster's New Collegiate Dictionary,* (Merriam-Webster 1956), and then, as was done in *Lanzetta v. New Jersey,* 306 U.S. 451, at 456, we set forth the 1931 oath in accordance with what we believe is a reasonable explication:

A. The 1931 Oath—(RCW 28.70.150):

> "I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the State of Washington, and will by percept and example promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

B. Definitions of key words used in the 1931 oath.

Percept, n.

1. Any commandment, instruction, or order intended as a rule of action or conduct, esp., a practical rule guiding behavior, technique, etc.

Institutions, n.

3. That which is instituted as: a) an established practice, law, custom, etc.; b) an established society or corporation; an establishment, esp. one of a public character, a foundation, as charitable institution; also, the building or buildings used by such organization.

Reverence, n.

1. Honor or respect felt or manifested; deference;
2. Profound respect mingled with love and awe;
3. A gesture of respect, as an obeisance or curtsy.

Law

1. The binding custom or practice of a community; rules of conduct enforced by a controlling authority; also, any single rule of conduct so enforced.

Order

5. Conformity to law or discourse: public quiet;
7. Condition in general; normal state;
8. The prevailing mode of a period;
9. A rule or regulation made by competent authority; also, a mandate.

Undivided

Not divided; not separated or disunited; unbroken; continuous, whole.

Allegiance

1. The duty of fidelity to one's government or sovereign state;

2. Devotion or loyalty to that which is entitled to obedience, or service and respect.

C. Wording of the 1931 oath in accordance with the foregoing definitions.

"I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the State of Washington, and will by commandment, instruction or order and example promote respect for the flag and established society practice, law and custom of the United States of America and the State of Washington, promote profound respect, mingled with love and awe and the normal state or condition in general and the prevailing mode of the period and I will give my continuous and whole devotion and loyalty to that which is entitled to obedience, the government of the United States."

D. Conclusion In re Vagueness.

The 1931 and 1955 oaths in our opinion are susceptible of a reasonable interpretation whereby persons pursuing free political discussion and association and engaging in action to seek that government be altered or modified in accordance with the will of the people will be liable to punishment or will suffer a credit and/or property loss, all of which results in the loss of liberty guaranteed for all our people, including teachers and employees at a great state university. The 1931 and 1955 oath statutes must fall (See *Stromberg v. California*, 283 U.S. 359, at 370.).

The 1931 and 1955 oath statutes are opposed to the Constitution of the United States, and this Court thus comes under a duty to exercise its judicial power to declare and enforce the supreme law residing in the United

States Constitution. It is no answer for the attorney general to state that these vague and ambiguous oaths contain scienter, and thus, scienter alone makes them definite and clear:

> "... where the overt act which constitutes the crime is insufficiently defined, a stipulation that the act must be done intentionally before it is unlawful is of no aid in determining what acts are fact within the definition. Furthermore, when the person affected is confronted with the borderline situation in which he has honest doubts as to the proper action, a resolution of the doubt in his own favor is often undistinguishable from a wilful evasion. Consequently the vagueness of the definition compel men to lean over backward in many circumstances in order to avoid imputations of the intent or bad faith specified in the statute. (Note, 26 Minn. L. Rev. 661-662.)

We believe the 1955 and 1931 oaths are unconstitutionally vague in their entirety and in each and every aspect under the cases cited in this brief, and particularly *Cramp v. Florida*, 368 U.S. 278, and cases cited therein, and that this Court should so hold.

IV.

The Oaths Are Bills of Attainder in Violation of the Constitutional Prohibition Thereof.

The oaths in question in this case are test oaths, punishing appellants legislatively without any adjudicatory process. The 1955 oath is expurgatory, and both oaths function, in this case, to deprive otherwise fully qualified and competent employees of their employment, good consciences and professional integrity.

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, at

320, this Court held that a statute depriving a person "of any rights, civil or political, previously enjoyed, may be punishment . . ." and constituted a bill of attainder. There can be no doubt that the statutes in this case infringe upon, and deprive appellants of "political" rights. In addition, tenure is a "right," and this Court has not considered state employment as a "privilege." Among the unconstitutional deprivations inflicted in *Cummings* were denials of the vote and the opportunity to hold office. In *United States v. Lovett*, 328 U.S. 303, denial of compensation for federal employment was held a sufficient deprivation to invalidate the statute as a Bill of Attainder.

The oaths in this case are not retrospective, but historically, Bills of Attainder need not be retrospective. As Mr. Justice Frankfurter pointed out in concurrence in *Lovett, supra*, at 323, "Frequently, a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or *ex post facto* Law shall be passed.'" This was the court's view in *Cummings, supra*, *ex parte Garland*, 71 U.S. (4 Wall.) 333, and *Lovett, supra*.

Recently, the opinions of this Court have erroneously accepted the principle that in order to constitute a Bill of Attainder a statute must be *ex post facto* rather than having been designed to prevent future actions. See, *American Communications Association v. Douds*, 339 U.S. 382, and *Communist Party of the U. S. v. S. A. C. Board*, 367 U.S. 1 at pages 86-87. An excellent writing has fully demonstrated this Court's error:

> "It is, however, a principle belied by the history from which its proponents contend it was culled . . . some English bills of attainder were passed in order to prevent certain types of future conduct on the part of the person or group attainted . . . these historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted." (Comment, The Bounds of Legislative Specifications: A Suggested Approach to the Bills of Attainder Clause, 72 Yale Law J. 330 at 338-339 (1962.))

Thus, it is clear that the opinions of this Court on this subject employ conflicting rationale; some cases, after 1949, have taken a literal approach to the problem, and others have taken a functional approach.

We believe that (1) the writings contemporary with the adoption of the Constitution, and that (2) the pre-Constitutional bills of attainder show that a literal interpretation of this clause, including a requirement of *ex post facto* operation, is error. A broad functional purpose should dominate this Court's future judicial construction of this constitutional provision. (See, Comment, 72 Yale Law J. 330). Historically, test oaths, such as those at issue in this case, have been notorious bills of attainder, and they have been stricken by this Court whenever they "inflict punishment absolutely, or may inflict it conditionally" (*Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 342), i.e., as a condition of employment. We submit that this Court should return to its original, and historically correct, functional approach to the bill of attainder clause, and, in so doing, it should strike the 1931 and 1955 test

oaths, prescribed by the Washington legislature, as unconstitutional and void bills of attainder.

V.

The District Court Upheld State Statutes Which Are Void Because They Violate the Supremacy Clause of the Constitution and Interfere With Foreign Affairs and Attempt to Promote Loyalty to and to Regulate, Restrict and Proscribe Sedition Against the United States, a Field Entirely Within the Province of the Federal Government, and Which the Congress of the United States, by Legislative Enactments, Has Preempted and Wholly Occupied.

This Court has indicated that the Washington Legislature has no more constitutional discretion to command loyalty to the federal government as a condition of the employment of appellants, and others similarly situated, than it has discretion to command loyalty to the government of France. Such legislation infringes on the highest prerogative of the sovereignty of the federal government: the power to command the loyalty of its people. It alone may legislate on questions of *national* loyalty.

> ". . . The United States is not only a government, but it is a national government, *and the only government in this country that has the character of nationality.*" Mr. Justice Bradley concurring in *Knox v. Lee*, 79 U.S. (12 Wall.) 457, at 555. (Emphasis supplied.)

As Chief Justice Marshall stated in the case of *The Exchange*, 11 U.S. (7 Cranch) 116 at 135:

> "The jurisdiction of the nation within its own territory is necessarily *exclusive and absolute.* It is susceptible of no limitation not imposed by itself. *Any restriction upon it, deriving validity from an external source, would imply a diminution of its sov-*

ereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." (Emphasis supplied.)

In *Pennsylvania v. Nelson*, 350 U.S. 497 at 509, this Court unequivocally held that the Pennsylvania decision on review was "unassailable" in its holding that: "Sedition against the United States is not a *local* offense. It is a crime against the *Nation (id.* at 505). Thus, "Congress having . . . treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem." *(ibid).*

This Court reaffirmed its position in *Uphaus v. Wyman*, 360 U.S. 72 at 76:

". . . In *Nelson* itself we said that the 'precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*'"

Thus, this Court, in *Uphaus*, has made it clear "that a State could proceed with prosecutions for sedition against the State itself" *(ibid)*, but that a state has no power to proscribe the same conduct against the United States, made criminal by the Smith Act.

It should be noted that the Washington Subversive Activities Act is broader than the Smith Act, and there

are many sections of both oath statutes under attack here that refer specifically to the United States and cover the same area and proscribe the same conduct prohibited by the Smith Act. It is clear that the State of Washington has no power to command anti-sedition, or undivided allegiance oaths viz-a-viz the United States, and that these portions of the oaths, referring to the United States, have been pre-empted. The District Court's inadequate paragraph on this point is manifestly in error, indicating that it did not reach the real issues, although they had been briefed and argued, when it decided the question:

> "The pre-emption argument based on *Pennsylvania v. Nelson*,[34] need not detain us long, on these facts. The Court's opinion in *Uphaus v. Wyman*[35] indicates that Nelson did not strip the states of the right to guard their own security and a state may legitimately make inquiry and investigate in this area."

The point is, however, that by enacting the 1931 and 1955 oath statutes, the Washington legislature has sought to guard the security of the government of the United States, which it has no power to do under *Pennsylvania v. Nelson*, as well as seeking to guard its own security. The 1931 and 1955 oath statutes are replete with references to the "government of the United States" and its "political subdivisions." *Pennsylvania v. Nelson* denies this power to the states. We think the District Court, below, committed clear error, and should be reversed, when it refused, over argument to the contrary, to strike, as unconstitutional, all references made by the 1931 and 1955

oath statutes to the government of the United States and its subdivisions.

There is yet another consideration, defeating the asserted state power. It concerns the power of a state to frustrate Congressional enactments providing for educational and cultural exchanges which promote good will abroad (22 U.S.C. 2451 et seq.). Does a state have constitutional power to require that the foreign professorial and research recipients of federal funds and good will, under Congressional enactments, must execute the 1931 and 1955 oaths as a condition of obtaining employment at the University of Washington?

That our federal government is heavily, and properly, involved in educational and cultural exchange programs cannot be doubted. A document entitled: Educational Exchange Grants, published in May, 1959, Revised No. 6789, by the United States Department of State, International Educational Exchange Service (Series 64), provides as follows at pages 24-25:

"MAJOR LEGISLATIVE AUTHORITY FOR THE PROGRAM

"Authority for carrying out the cultural exchange program described herein is derived from legislation enacted by the United States Congress. Dollar funds appropriated annually are used jointly with certain foreign currencies earmarked for educational purposes in the interest of economical administration as well as to expand the scope of the program.

"The principal laws are:

"*Public Law 402, 80th Congress,* as amended, the

United States Information and Educational Exchange Act of 1948 (the Smith-Mundt Act). It provides the basic authority for reciprocal educational exchange programs between the United States and other countries and authorizes the annual appropriations of funds by the United States Congress.

"*Public Law 355, 76th Congress,* an Act for Cooperation With the Other American Republics. It authorizes exchanges between the United States and the other American Republics.

"*Public Law 584, 79th Congress* (the Fulbright Act). It provides that certain foreign currencies owed to or owned by the United States as a result of surplus property sales abroad may be used to finance exchanges between the United States and certain foreign countries for study, teaching, lecturing, advanced research, or other educational activities. Pursuant to this legislation, executive agreements are negotiated with individual countries to provide for educational exchange programs.

"*Public Law 400, 82nd Congress* (the Mutual Security Act of 1952). It amends the Fulbright Act by providing for the use of educational exchange of foreign currency creditors owed or owned by the United States and not required by law or agreement to be expended or used for any other pupose.

"*Public Law 480, 83d Congress,* as amended (the Agricultural Trade Development and Assistance Act of 1954). It authorizes proceeds from the sale of surplus agricultural commodities for educational exchange programs established under other legislative authorizations including assistance to American-sponsored schools abroad.

"*Public Law 931, 85th Congress.* It amends the Agricultural Trade Development and Assistance Act of 1954 by authorizing the additional use of foreign currencies for providing assistance, in such amounts as may be specified from time to time in appropria-

tion acts, by grants or otherwise, in the expansion or operation in foreign countries of established schools, colleges, or universities founded or sponsored by citizens of the United States, for the purpose of enabling such educational institutions to carry on programs of vocational, professional, scientific, technological, or general education; and in the supporting of workshops in American studies or American educational techniques, and supporting chairs in American studies.

"*Public Law 265, 81st Congress.* It provides that part of the annual payment of Finland's World War I debt to the United States may be used for educational exchanges between the two countries. This act also provides for the interchange of scientific, technical, and scholarly books and laboratory and technical equipment between Finland and the United States.

"*Public Law 48, 82nd Congress* (The India Emergency Food Aid Act of 1951). It authorizes the use of certain sums, payable by the Government of India to the United States as interest on the emergency food relief loan, for educational exchanges between the two countris including the interchange of certain types of books and laboratory and technical equipment.

"*Public Law 665, 83rd Congress.* It authorizes the use of approximately 500,000 Irish pounds for scholarship exchange between the United States and Ireland.

"*Conventions.* The United States has also ratified the following two conventions which provide for cultural exchanges with Latin America:

"Convention for the Promotion of Inter-American Cultural Relations, signed at Buenos Aires, Argentina, in 1936.

"Convention on Inter-American Cultural Relations, signed at Caracas, Venezuela, in 1954."

The above document was published in 1959. However,

in 1961, by enacting the Fulbright-Hayes Act (Public Law 256, 87th Cong.—Mutual Educational and Cultural Exchange Act of 1961) Congress authorized educational exchanges for studies, research, instruction, and other educational activities. This Act consolidated the previous legislation, and created the United States Advisory Commission on International Education and Cultural Affairs.

Under 22 U.S.C. § 2452, the President is authorized "to provide, by grant, contract, or otherwise, for . . . . (1) educational exchanges, (i) by financing studies, research, instruction, and other educational activities . . . (B) of or for citizens and nationals of foreign countries in American schools and institutions of learning . . . and (ii) by financing visits and interchanges between the United States and other countries of . . . teachers, instructors and professors; . . ." The implementation of this power is found in Volume 22 of the Code of Federal Regulations. 22 CFR § 61 provides for payments to, and on behalf of, participants in the educational exchange program; § 61.4 specifically provides grants to foreign scholars so that they might lecture, teach, and engage in research or training, and § 63.1 includes teachers and professors under the Exchange-Visitor Program.

The actual functioning of these programs started in 1938, but it was not until 1946 that the programs became world-wide in their scope. ("A beacon of hope—The Exchange-of-persons program," a report from the U. S. Advisory Commission on International Educational and Cultural Affairs. April, 1963., p. 10, fn. 1.) At present, the International Educational Exchange Program extends

to more than eighty foreign countries ("Educational Exchange Grants," International Exchange Service, Bureau of Public Affairs, Department of State. May, 1959, p. 1) bringing under the Fulbright-Hayes Act 4,800 foreign students, teachers, professors, research scholars, leaders and specialists in different fields to the United States. (Annual Report 1962 by the United State Department of Health, Education and Welfare to the President of the United States, pp. 304-309.)

While the federal laws provide for grants to both United States and foreign citizens, our primary concern is directed to grants and interchanges involving foreign citizens who are professors and scholars, and who come to the United States to participate through employment by a state at its college or university. Under the Fulbright Act, only international transportation is paid for by federal funds. Usually the host institution provides employment compensation. ("Educational Exchange Grants," International Exchange Service, Bureau of Public Affairs, Dept. of State, May, 1959, p. 19.) Thus, for example, such persons would be "employees" of the University of Washington (R. 163), and required to execute the 1931 and 1955 oaths.

In 1961, the following grants were made to foreign citizens on an exchange program: Advanced research, 456; Teaching or teacher development, 705; University lecturing, 133. (Annual Report to Congress, Educational and Cultural Exchange program, July 1, 1960-June 30, 1961, Annual Report to Congress at page 65, Appendix A; for a breakdown by countries there are other charts in Ap-

pendix A.) In 1962 the foreign grantees were: Lecturers and Research Scholars, 621; Teachers, 736. (See footnote 1 at page 65 of Annual Report to Congress.)

Like many other universities, the University of Washington is a participant in the above federal programs. (See, e.g., "Open Doors 1957" and "Open Doors 1959," Institute of International Education at pages 31 and 34.)

Congress' purpose in providing for the educational and cultural exchanges has been set forth in 22 U.S.C. § 2451:

> "The purpose of this chapter is to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange."

Yet, the realization of this Congressional purpose surely will be defeated, or materially deterred, if a state legislature has constitutional power to require that foreign citizens who participate in these programs swear that "by precept and example" they will "promote . . . respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States," or that, as defined by the 1955 oath statute, they are not "subversive persons," nor are they members of "foreign subversive organizations," "subversive organizations," or of the communist party. No state legislature has such power under the supremacy clause. We ask that this Court hold that the 1931 and 1955 oath statutes to have been fully and completely pre-empted by Article VI of the United States Constitution.

VI.

The District Court Upheld the Washington Statutes Requiring Oath Forms A and B Which Are Void Under the Fourteenth Amendment's Due Process Clause, Protecting Appellants Against Compulsory Self-Incrimination.

A. Both the 1931 and 1955 Statutes Establish a Civil "Penalty" or "Forfeiture" Within the Scope of the Fifth Amendment Protection Against Self-Incrimination.

A cardinal tenet of the Anglo-American concept of procedural due process is freedom from self-incrimination. *United States v. White*, 322 U.S. 694, at 698-699 (dictum), and *Quinn v. United States*, 349 U.S. 155, 161-162 (dictum). Mr. Justice Field, dissenting in *Brown v. Walker*, 161 U.S. 591, at 637, declared:

> "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration."

The state may not coerce the production of either testimony or effects from a party against whom—if produced—such evidence might lead to the imposition of a "forfeiture" or "penalty." *U. S. v. Collins*, 25 Fed. Cas. 545; *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476.

Failure of appellants to execute oath forms A or B will result in loss of their tenure rights, good reputations, credit standing, and even their chosen livelihood for which many have spent years in preparation (R. 174, 176, 212). This result constitutes a "forfeiture" or "penalty" within the protection of the rule against self-incrimination. *Cohen v. Hurley*, 366 U.S. 117 at 145-149 (dissenting opinion);

35 Tul. L. Rev. 400 at 428 (1961). It is not enough to say that these statutes are not retributive in purpose or are aimed at preserving the State of Washington. Their substance and effect are punitive, and their purported motivation of public protection lies at the core of every criminal law. 35 Tul. L. Rev. 400, 414 (1961). The oaths serve no purpose other than invading constitutionally protected freedoms.

B. The 1955 Statute Is Void as Requiring Plaintiffs, and Others Similarly Situated, to Incriminate Themselves with Respect to Their Own Disloyalty.

Even if the civil jeopardy in which plaintiffs are placed upon presentation to them of the oath forms does not invoke the privilege against self-incrimination, surely potential conviction by the state for a criminal felony does. *Blau v. United States*, 340 U.S. 159; *Hoffman v. United States*, 341 U.S. 479. Yet, this eventuality is exactly what appellants, and others similarly situated, are subjected to by the 1951 statute, as amended, requiring that they execute the so-called "negative disclaimer." Chapter 377, Laws of Washington, 1955, amending Chapter 254, Laws of Washington, 1951 (RCW 9.81.070); the pertinent provision of which reads:

> ". . . Every such person, board, commission, council, department, court or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment."

Since a "subversive person" or member of the communist party or other "subversive" organization is defined *within the same statute* as constituting a felony (RCW 9.81.020-030) and since the avowed function of the legislation—as construed in *Nostrand v. Balmer*, 53 Wn.(2d) 460—is the removal of such "subversives from the state payroll," appellants and others similarly situated, who refuse to sign the oath would necessarily be providing a "link in the chain needed in a prosecution" under 9.81.020 of the Act, as well as under the Smith Act. *Blau v. United States*, 340 U.S. 159 at 161. Appellants are thus faced with a Hobson's choice. Either they must execute an oath which is vague in its scope (an act in itself offensive to them, causing them emotional anguish in that they must compromise their consciences) and thus face, either because of professional activities or intellectual belief, the genuine possibility of prosecution for perjury by a zealous state, or appellants may choose to refuse to execute the oath, thus facing immediate dismissal, the suspicion of their contemporaries, the taint of disloyalty, and—by their own act of refusal—the possibility of prosecution by a zealous state for the felony of being a "subversive person." There is no middle ground. There are no reservations. There is no opportunity given for explanation by either the statutes commanding the "1931 oath" or those commanding the "1955 oath."

That this probability is a realistic one is corroborated by this Court in *Cramp v. Florida*, 368 U.S. 278, at 286-287. This Court looked to peripheral activity such as that engaged in professionally by appellants:

> ". . . While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."

and in *Slochower v. Board of Education*, 350 U.S. 551 at 557-558:

> ". . . [A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The deficiencies of the process are even more constitutionally repugnant as (a) there are other means available, and used, by the state for determining the qualifications of its employees at the University of Washington other than the ritual under consideration, and (b) as shown by appellants in their evidence, the signing or non-signing by them of the ritual has no rational bearing on their fitness to teach. The latter consideration distinguishes this case from the disbarment cases, and from the secondary school teacher cases.

The states do not have "free reign . . . in the choice of means of forcing incriminatory testimony . . ." *Cohen v. Hurley*, 366 U.S. 117 at 129. The "1955 Oath," with the moral, professional and legal compunctions which it presents to the affiant, is certainly such a case where the legislature has strayed beyond its constitutional bounds.

We submit the time has come for this Court fully to incorporate the privilege against self-incrimination into the due process clause of the Fourteenth Amendment, and, in its application to this case to hold the 1931 and 1955 oath statutes unconstitutional and of no force and effect.

VII.

The District Court Improperly Refused to Declare Constitutional Rights of Appellants Regarding the 1931 Oath and Committed Error in Dismissing Appellants' Complaint With Prejudice.

A. The District Court Committed Error in Not Declaring Appellants' Constitutional Rights Regarding the 1931 Oath.

It is not clear whether the lower court invoked the abstention doctrine. It appears that the lower court believed it had absolute power to grant or deny declarative relief. In either event, this Court has made it absolutely clear that a United States District Court does not have untrammeled discretion to grant or deny declaratory relief, or automatically to invoke the doctrine of abstention, simply because the constitutionality of an unconstrued state statute, or an ambiguously worded state statute, is called into question. This much was implicit in *Harrison v. NAACP*, 360 U.S. 167, and this Court made the matter explicit in *NAACP v. Bennett*, 360 U.S. 471, and see, *Romero v. Weakely*, 226 F.(2d) 399 (C.A. 9th Cir. 1955). Nor has this court required that a complaint be dismissed when such questions arise. This has been clear since *Doud v. Hodge*, 350 U.S. 485 at 487:

> "This Court has never held that a district court is without jurisdiction to entertain a prayer for an

> injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state court had not yet rendered a clear or definitive decision as to the meaning of federal constitutionality of the statute."

Given the above holdings, and *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, it is obvious that a District Court cannot, without committing error and abusing its discretion, refuse declaratory relief and invoke the doctrine of abstention where the legislative language is clear or where only one reasonable interpretation of the words is possible. In these circumstances it is the duty of the District Court to decide the constitutional question. *Toomer v. Witsell*, 334 U.S. 385. This duty is the logical corollary of the holding in *Harrison v. NAACP*, 360 U.S. 167. Moreover, this is precisely what has been done in *Schempp v. School District of Abington*, 177 F. Supp. 398 (E. D. Pa. 1959), without adverse criticism from this Court, 364 U.S. 298.

Even more so is it the duty of a District Court to decide the constitutional question presented to it when the District Court itself has concluded that the statutory language is clear, as the lower court did in this case with respect to the denial of a hearing and the summary operation of Section 4 of the 1931 oath statute. The lower court declared:

> "In view of the mandatory language there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit, therefore, that the District Court committed

error and abused its discretion when it refused a declaration on the constitutionality of Section 4 of the 1931 oath enactment.

Furthermore, we submit that the lower court viewed its power as extending so far as to deny its own jurisdiction, and further, to invoke abstention as untrammeled and without boundaries, including the power to defeat the very purpose of the Declaratory Judgment Act, the jurisdictional statutes: 28 USC 1331 and 1343 (3), and the civil rights statute 42 USC 1983 involved in this case. The lower court stated that the granting of declaratory relief was a matter of sound discretion committed to the District Courts, and:

> "Accordingly, in the absence of a concrete factual showing that any plaintiff or any member of the class of state employees here represented *has suffered actual injury by reason of the application* of the oath of allegiance statute . . . this court will decline to render a declaratory judgment . . ." (Emphasis supplied.)

Since a declaratory judgment action necessarily must be brought before "actual injury by reason of the application" of the oath to appellants, the District Court has set an impossible burden upon their shoulders. Appellants cannot show *actual injury* before the statute has been actually applied to them. Yet, appellants cannot obtain a declaration of rights, under this ruling, without subjecting their rights to actual injury. Thus, the position of the District Court completely defeats the purpose of Congress when it enacted the jurisdictional statutes, the civil rights statute, and the Declaratory Judgment Act.

> "One of the highest offices of declaratory procedure is to remove uncertainty and insecurity from legal relations, and thus clarify, quiet and stabilize them before irretrievable acts have been undertaken." *(Delaney v. Carter Oil Co.*, 174 F.(2d) 314 at 317 (C.A. Okl. 1949), cert. den. 338 U.S. 824.)

This is also the view of the Ninth Circuit:

> "The purpose of the Declaratory Judgment Act is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." *(Shell Oil Co. v. Frusetta,* 290 F.(2d) 689 at 692 (C.A. 9th Cir. (1961)).

We submit that the lower court abused its discretion when it abandoned this view and that it committed error in refusing to rule on the constitutionality of the 1931 oath statute for the reason that appellants had not yet shown any actual injury.

In addition, we submit that the following words with respect to the 1931 oath are clear and can have only one reasonable interpretation, and that the lower court forthrightly should have ruled this oath unconstitutional as an infringement upon the First and Fourteenth Amendments, and the Supremacy clause:

> "I solemnly swear . . . that I will . . . by precept and example promote . . . undivided allegiance to the government of the United States."

Indeed, the District Court itself must have believed that these, and other, words of the 1931 oath were clear because at the beginning of its opinion on the 1931 oath, the court refers back to its discussion of the First Amend-

ment with respect to the 1955 disclaimer oath. It stated that:

> "Insofar as the arguments heretofore considered with respect to the loyalty oath are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the lower court did not invoke abstention on these points and that it ruled erroneously on the substantive questions. However, if it be the view that the lower court did invoke abstention, then, we submit that it abused its discretion in so doing, as the above quoted paragraphs clearly demonstrate and that it should now be reversed. *NAACP v. Bennett*, 360 U.S. 471; *Toomer v. Witsell*, 334 U.S. 385, and *Cf. Chicago v. A. T. & S. F. Ry.*, 357 U.S. 77.

B. The District Court Committed Error in Dismissing Appellants' Complaint Assuming, Arguendo, That Abstention Was Properly Invoked.

The doctrine of abstention does not raise a question of power, but rather, a question of judicial discretion. *Catoggio v. Grogan*, 149 F. Supp. 94 (D.C. New Jersey 1959). The doctrine is designed to serve the purposes of comity, allowing a state court to resolve questions of statutory construction, where state statutes are reasonably and fairly open to doubt. But, as this Court has declared:

> ". . . This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; . . ." (*Harrison v. NAACP*, 360 U.S. 167 at 177).

Thus we submit that the District Court committed error when its final order certified that appellants' "complaint be and it hereby is dismissed with prejudice."

VIII.

Washington's Legislature Has No Constitutional Power to Disqualify Every Citizen Absolutely From the Profession of Teaching, Public and Private, on the Sole Ground That He Has Refused to Execute the Oath of Undivided Allegiance.

It is beyond doubt that the profession of teaching is an old, honorable and lawful one, and that its calling is within the "liberty" protected from unwarranted deprivation by the Due Process clause of the Fourteenth Amendment:

> "Plaintiff in error taught this language [German] in school as part of his occupation. His right thus to teach and the rights of parents to engage him so to instruct their children, we think, are within the liberty of the (Fourteenth) Amendment." (*Meyer v. Nebraska*, 262 U.S. 390 at 400 and see, *Farrington v. Tokushige*, 273 U.S. 284, and *Pierce v. Society of Sisters*, 268 U.S. 510.)

Appellants admit, as indeed they must, that Washington may submit the profession of teaching to regulations, but those regulations must be reasonable and rationally connected with fitness for teaching. *Douglas v. Noble*, 261 U.S. 165; *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 at 239, footnote 5.

In this case, the oath requires that all teachers have closed minds on certain subjects, e.g. allegiance to government, regardless of their consciences or religion. We

submit that such a requirement cannot constitute a rational relationship to fitness for the profession of teaching. This Court declared as much in *West. Va. v. Barnette*, 319 U.S. 624.

In the *Barnette* case, this Court disallowed States power to compel children to pledge allegiance to the flag of the United States. Making a sharp distinction between education and indoctrination, this Court defined the question there as follows:

> "'. . . the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty which tend to inspire patriotism and love of country . . . Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to arouse loyalties constitutionally may be a short-cut by substituting a compulsory salute and slogan. . . .'" (At p. 631)

If a state cannot require its school children compulsorily to perform this act of allegiance (albeit not "undivided"), we submit that it cannot be said that a broader and more severe oath, the 1931 oath, is a rational qualification for teachers. Even if the oath were rational for first grade teachers, which we do not admit, appellants are university professors whose function it is to inspire their students toward the discipline of an unfettered search for truth, no matter what conforming idolatry might be shattered in the process.

". . . But freedom to differ is not limited to things

> that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Va. v. Barnette*, 319 U.S. 624 at 642.

To hold that the 1931 oath, however construed, is rationally related to the fitness of a university professor is to deny religious and academic freedom, and to make a mockery of our great universities. The irrelevance of this oath to fitness to teach at the university, indeed its hostility to true qualifications of fitness, is clearly revealed by the past practice of university administrators.

We submit that the District Court should be reversed and that reversal is not foreclosed by such cases as *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82, or *In re Summers*, 325 U.S. 561, which relied upon *U.S. v. Schwimmer*, 279 U.S. 644, *and U.S. v. Macintosh*, 283 U.S. 605, and which were overruled in *Girouard v. U.S.*, 328 U.S. 61.

IX.

The Interest of Student-Appellants in Academic Freedom Is Adequate to Afford Them Standing to Sue.

This Court has recognized that academic freedom is protected by the First and Fourteenth Amendments, and that a professor has standing to invoke those Amendments when his interest in academic freedom is unwarrantedly infringed upon by a state. *Sweezy v. New Hampshire*, 354 U.S. 234. Furthermore, this Court, rightly, has recognized that academic freedom has two sides and that it necessarily involves students as well as professors.

> ". . . When academic teaching-freedom *and its corollary learning-freedom*, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . *into this constitutionally protected domain.*" (*Barenblatt v. U.S.*, 360 U.S. 109 at 112) (emphasis supplied)."

Despite the above, the District Court, in its Order on Motion to Dismiss, dismissed the student-appellants from this action. Yet, this case directly affects the quality of learning-freedom afforded students at the University of Washington. However, the lower court held that the student-appellants had "no direct legal interest in the requirement imposed on the teaching personnel." In so doing it cited three cases, none of which was discussed, nor was its citation of any apposite.

The District Court did not discuss, distinguish, or determine why the following cases, supporting student standing and argued to it, were not applicable to this case: *Engel v. Vitale*, 370 U.S. 421 (parents allowed to assert the rights of their children to attack a prayer required in the schoolroom); *Adler v. Bd. of Ed.*, 342 U.S. 485 (the parental assertions of the rights of their children in academic freedom were put forth to contest the validity of New York's Feinberg Law which was upheld by this Court over a dissent by Mr. Justice Frankfurter wherein he would have denied review on the basis of their lacking an interest to afford standing); *Hamilton v. Bd. of Regents*, 293 U.S. 245 (students at a state university had standing to contest a mandatory ROTC program); *Pierce v. Society of Sisters*, 268 U.S. 510 (the society asserted the constitutional rights of students to be educated in a private

sectarian school); *Waugh v. Bd. of Trustees*, 237 U.S. 589 (student who applied for admission had standing to challenge a university's ban on fraternal allegiance).

In *Shelton v. Tucker*, 364 U.S. 479 at 487, this Court declared that "the vigilant protection of constitutional freedoms is nowhere more vital than in the Community of American schools." And in another significant case, this Court said:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (emphasis supplied). *(Sweezy v. New Hampshire*, 354 U.S. 234 at 250).

We submit that the oaths in this case create "an atmosphere of suspicion and distrust," particularly when a student's testimony might be the subject of subpoena and afford a link in the evidence offered in a prosecution of his professor for falsely signing these oaths. Thus, there is an infringement upon both aspects of the constitutionally protected domain of academic freedom. Inevitably, these oaths, if applied, will shrink the domain of learning-freedom afforded students at the University of Washington. We believe that the student interest in academic freedom in this case is substantial; that it affords them standing to sue, and that the lower court's ruling to the contrary should now be reversed.

CONCLUSION

The issues presented in this case go to the heart of democratic processes in America. Today, when man has so much to learn about himself and his neighbors, it is vitally important to keep open the channels of academic and public discussion concerning the vital and troublesome questions which face the people of our nation in these difficult times. If upheld, the exercise of power by Washington's legislature in demanding the oaths in question here will block discussion of vital issues in the academic community where novel ideas and bold plans must be generated and evaluated. No legitimate interest of the state justifies the breadth of suppression of free expression, and the curtailment of the search for truth, which will occur if these oaths are applied to the University of Washington.

Universities and colleges do not possess or teach the whole truth. They are engaged in the quest for truth. For that reason their scholars must be left free to examine all facts and ideas, the unpleasant, the distasteful, and the dangerous ones, and even those regarded as erroneous by a majority of the Washington legislature. If a professor's theories fail to encompass the whole truth and do not conquer in detail every nuance of his subject, they may, nevertheless, profoundly broaden and alter the picture given by the last scholar in the field.

To a scholar, unchallengeable dogma and hypothesis are fundamentally incompatible with the very life spirit of a university. "The concern of its true scholar is not merely to add and revise facts in relation to an accepted

framework, but to be ever examining and modifying the framework itself." *Sweezy v. New Hampshire*, 354 U.S. 234 at 263 (concurring opinion). Some people believe that communists have become prisoners of dogma and no longer are intellectually free. Hence, these people argue that communists are unfit to teach at a university and can be excluded from the company of true scholars. This test may have some validity. But, if it does, by that same token, every professor who subscribes by oath or affirmation to the body of beliefs and dogmas officially, but unconstitutionally, set forth by the Washington legislature in the two enactments in issue in this case is likewise a prisoner of dogma. He is not intellectually free, and should be disqualified from teaching at a university for the same reason that a communist is disqualified.

Since early times, loyalty oaths, such as the 1931 and 1955 oaths involved here, have taken the form of tests of religious orthodoxy as well as secular conformity, and they have always been backed up with potent sanctions. (Hyman, To Try Men's Souls: Loyalty Tests In American History (1959).) Throughout history, loyalty oaths have appeared in times of crisis; the framers of such oaths having assumed that all men agree on what loyalty is, (but see, Grodzins, The Loyal And The Disloyal: Social Boundaries of Patriotism And Treason (1956)). There can be no doubt that our Nation currently is in an age of crisis crisis and transition, and thus, the appearance of test oaths can be expected. But, they are inimical to freedom. We think that if academic freedom were fully and completely to receive its due, rather than constrained by these oaths, then, our Nation's transitions will be made easier for our

society. For example, our Nation is sorely in need of fearless, intellectual guidance which will help adjust our race relations so they will comport with the ideals of our Constitution. But, power of a state legislature to prescribe oaths and affidavits, see *Shelton v. Tucker*, 364 U.S. 479, which must be executed as conditions of professorial employment, can be used to bar professors and teachers from effectively bringing their talents to bear on this critical social problem. We believe that the guaranty of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley Int. Pictures v. New York*, 360 U.S. 684, 689. Today, our society needs independent universities with fearless professors and researchers just as much as it needs independent judges. "The government pays judges, but it does not tell them how to decide. An independent . . . university is as essential to the community as an indepedent judiciary." (Chaffee, The Blessings of Liberty (1956), p. 241, n. 2.)

Academic freedom is not only, at bottom, a matter of a professor's freedom peaceably to speak his mind. That freedom is involved, and it is crucial, but it is afforded to every American. Academic freedom is also, and perhaps more fundamentally, the freedom of the academic community to employ, or otherwise bring before it, and associate with, anyone whose ideas and opinions, popular or hated, it may think of unique interest or importance. Academic freedom is a part, and a very important part, of the freedom of our sovereign people to educate themselves for the responsibility of governing themselves, and as such, academic freedom is decidedly with the protec-

tion of the First Amendment to the Constitution of the United States.

In the field of public discussion, when citizens and their fellow thinkers "peaceably assemble" to listen to a speaker, whether he be American or foreign, conservative or radical, safe or dangerous, the First Amendment is not only, in the first instance, concerned with the "right" of the speaker to speak, and to say this or that. Rather, the First Amendment is concerned with the listeners as well. It protects the authority of the hearers peaceably to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration. Thus, if for any reason, a man who is otherwise competent and qualified, on grounds of substantive merit in his discipline, is chosen to speak to, or is chosen to join an academic community, as professor or guest lecturer, and is prevented from doing so, then, it is the liberty and freedom of the academic community as a whole that has been abridged and violated. That violation is precisely what Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, amending the Washington Subversive Activities Act, Ch. 254, Laws of Washington, 1951, seek to accomplish by depriving appellants and their associates in the academic community, on non-substantive grounds, of their freedoms of expression and conscience.

As such, we ask this Court to declare and adjudge that the aforementioned laws, and their required oaths, on their faces, and as they have been sought to be applied to appellants herein, are unconstitutional, void and of no

effect, and that the District Court, below, be reversed, and that appellees, and their successors, permanently be enjoined from further enforcing, operating and executing such statutes, and their required oaths, and that appellants be granted costs, and other equitable relief as may be proper.

Respectfully submitted,

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January, 1964

APPENDIX A

UNITED STATES CONSTITUTIONAL PROVISIONS, STATE STATUTES AND OATHS INVOLVED

I.

UNITED STATES CONSTITUTION

Article 1, Section 10: "No State shall . . pass any Bill of Attainder, ex post facto law, . . ."

Article VI: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V: "No Person shall . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or propert , without due process of law; . . ."

Amendment XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

II.

THE 1931 ENACTMENT: Chapter 103, Laws of Washington, 1931.:

"Section 1. That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:

"'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'

"No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation.

"Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, or is entirely or in part exempt from taxation, shall before entering upon the discharge of his or her duties subscribe to the oath or affirmation prescribed in section 1 before a person authorized by law to administer oaths and/or affirmations, such oath or affirmation to be executed in

duplicate and one copy filed with the head of such institution and the other retained by such deponent.

"Sec. 3. The clerks of school boards are hereby authorized to administer the oath required by this act.

"Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided, and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void.

"Sec. 5. If any section of this act shall for any reason be held invalid, that such construction shall not affect the other provisions herein contained not expressly invalidated.

"Sec. 6. The oath herein provided shall be required of all teachers whose contracts are renewed or executed from and after March 1, 1931.

"Passed the Senate March 4, 1931.

"Passed the House March 10, 1931.

"Approved by the Governor March 20, 1931."

III.

THE 1955 ENACTMENT: Chapter 377, Laws of Washington, 1955, Amending Chapter 254, Laws of Washington, 1951 (The Subversive Activities Act):

A. By Chapter 377, Laws of 1955, the 1951 enactment was amended by adding two new sections and amending Sec. 12 (RCW 9.81.010) (Amendatory language of the 1955 Act has been set forth below in italics):

"SECTION 1. Section 12, Chapter 254, Laws of 1951, and RCW 9.81.070 are each amended to read as follows:

"Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment.*" (RCW 9.81.070.)

"SEC. 2. Section 13, Chapter 254, Laws of 1951, and RCW 9.81.080 are amended to read as follows:

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof.

"SEC. 3. *For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No. 9835.* (Held unconstitutional by the Washington Court).

"SEC. 4. *The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder.*" (RCW 9.81.083).

B. Chapter 254, Laws of Washington, 1951 (RCW 9.81 *et seq.*) (The definitional sections of the 1951 Act, incorporated into the 1955 Act, Chapter 377, Laws of Washington, 1955, are set forth below):

Subversive Person Ineligible for Public Employment.

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5))

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet,

advise, or teach activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010 (2))

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3))

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083) (Added in 1955).

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every

employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

IV.

OATH FORMS A AND B

Oath Form A

STATE OF WASHINGTON

Statement and Oath for Teaching Faculty of the University of Washington

I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

I further certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member

of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....

(Signature)

.....

(Title and Department)

Subscribed and sworn (or affirmed) to, before me this .....day of ....., 19.....

.....

Notary Public in and for the State of Washington, residing at .....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed," respectively.

Oath Form B

STATE OF WASHINGTON

Statement and Oath for Staff of the University of Washington Other Than Teaching Faculty

I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070, and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the con-

tents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....

(Signature)

.....

(Title and Department or Office)

Subscribed and sworn (or affirmed) to before me this .....day of ....., 19.....

.....

Notary Public in and for the State of Washington, residing at .....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed" respectively.

APPENDIX B

Relevant Minutes of the Meeting of the Board of Regents, University of Washington, May 25, 1962:

MINUTES
MEETING OF BOARD OF REGENTS
UNIVERSITY OF WASHINGTON
May 25, 1962

The Board of Regents met in executive session beginning at 9:30 a.m., Friday, May 25, 1962, in the Regents' Room on the University of Washington campus. The open meeting began at 3:00 p.m.

Present were Regents Bullitt, Drumheller, King, Little, Murphy, Shefelman, and Willis; President Odegaard and Secretary Hoagland. Also present were Mr. Conrad, Mr. Harlocker, Mr. Look, Dr. Schram, Dr. Thieme, and Mr. Wageman. Mr. Little was present for most of the morning session and was excused from the afternoon session because of his commitments relating to Secretary Dean Rusk's visit to Seattle.

Due regular and usual notice of this meeting had been given to the press, radio, television, and the public by Mr. Irwin S. Blumenfeld as appears from his affidavit in the files of the Secretary's office.

MINUTES OF THE PREVIOUS MEETING

The minutes of the April 27, 1962 meeting were approved as circulated to the members of the Board in advance of this meeting.

ACADEMIC AFFAIRS

* * *

LOYALTY OATH AND OATH OF ALLEGIANCE

President Odegaard reported to the Board that the University had been advised by the Office of the Attorney General of the State of Washington that pursuant to the decision of the Supreme Court of the United States there had been dissolved the restraining order which had the effect of suspending the requirements as provided by state law that all employees should sign the loyalty oath and that the teaching faculty should sign in addition the oath to support the constitution.

He stated that like every other board, commission, council, department, court or other agency of the State of Washington, the Board of Regents is required by state law to use procedures designed to ascertain whether a person employed by it is a subversive person and to require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization. The Office of the Attorney General has provided an approved form of statement and oath to carry out the statutory requirements.

It was noted that the law further provides that "refusal to answer on any grounds shall be cause for immediate termination" of employment. To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, President Odegaard stated that he will request a check of the personnel records of the University so that

those persons who have not previously sworn to the required oaths may be requested to do so. They will receive letters of request as soon as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, he recommended that compliance be requested by October 1, 1962, with notification that employment will be terminated 30 days later, as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign.

Upon the recommendation of the Educational Policy Committee the Board of Regents approved the schedule recommended by the President of the University and in addition adopted the following statement:

If any member of the faculty having tenure should fail to comply with the state requirements, be given notice of termination of employment, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with a provision of Washington state law which is binding upon the Board of Regents.

Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:

> "The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.
>
> "They furthermore accept in principle the concept

that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the State of Washington."

In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath.

FINANCE COMMITTEE

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY DAVID M. EAYES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, *Appellants*,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, *Appellees*.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

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Attorney General,
HERBERT H. FULLER,
Deputy Attorney General,
DEAN A. FLOYD,
Assistant Attorney General,
Attorneys for Appellees.
Office and Post Office Address: Temple of Justice, Olympia, Wash.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. McMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, *Appellants*,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, *Appellees*.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

INTRODUCTION

For convenience, appellants shall be called "Employees." For the same reason appellees shall be called "Regents" even though they include, in addition, the President of the University of Wash-

ington and the Attorney General. The duty of the Attorney General is to defend legislative enactments against attack on grounds of unconstitutionality. The statutory duty of the Regents is to administer the legislative enactments in question.

The term "1931 oath" refers to the oath required by chapter 103, Laws of the State of Washington 1931. (Cf. RCW 28.70.150 et seq.) "Disclaimer oath" or "1955 oath requirement" refers to the oath required by section 12, chapter 254, Laws of the State of Washington 1951, as amended by chapter 377, Laws of the State of Washington 1955. (Cf. RCW 9.81.070) "Subversive Activities Act" refers to the 1951 act, as twice amended.

PART I

ADDITIONS AND CORRECTIONS TO EMPLOYEES' STATEMENT OF THE CASE

It is necessary to deal, in this section, with the statutes enacted, and litigation relating to subversive activities arising since World War II, the 1955 oath, the "refusal" of Employees to sign the oaths and with the legal status of the Employees.

STATUTES AND LITIGATION RELATING TO SUBVERSIVE ACTIVITIES SINCE WORLD WAR II

A. Statutes

It is necessary to consider chronologically the statutes and the litigation involving subversive activities since World War II. Chapter 377, Laws of

1955 cannot be viewed in a vacuum. It is amendatory and it is only one of a number of acts passed over a period of years since World War II. It is necessary to examine these other acts as well and to consider their legislative background. (See *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, at p. 465 *et seq.*)

In 1947 the legislature passed the first of these measures. (Laws of 1947, chapter 287, section 2, p. 1334.) It was a proviso in the appropriation act forbidding public funds from reaching public employees who advocated, or who were members of organizations which advocated, the overthrow of the government of the United States by force or violence. During the same session, the legislature, through House Concurrent Resolution No. 10, created a joint fact-finding committee on un-American activities. (Laws of 1947, p. 1378) This committee held extensive hearings, involving many witnesses.

The committee reported its extensive findings and recommendations to the 1949 session of the legislature. (House Journal 1949, p. 1095.) On page 1095, the committee incorporated by reference two lengthy printed reports containing a stenographic transcript of the hearings, the *First Report Un-American Activities in Washington State, 1948*, and *The Second Report, Un-American Activities in Washington State, 1948*. The *First Report* and *Second Report* are a part of the record in this case, though, because of their bulk, not the printed record.

In 1949 the legislature enacted a proviso, as part of its appropriation act, similar to that adopted by the legislature in 1947. During that session four separate bills were introduced to continue this committee (House Bill No. 264; Senate Bills 361, 378 and 356, this last by title only). Not one became law.

In 1951 the Governor in his message to the legislature urged the legislature to "give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hand of our enemies." He further pointed out that,

> "By Concurrent Resolution No. 10, the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. * * *" (*House Journal 1951*, beginning at p. 23).

A bill was introduced by executive request which later became chapter 254, Laws of 1951. This act is very similar to Maryland's Ober Act. (Chapter 86, Laws of Md. 1949, Anno. Code of Md., Article 85A.) Five of the original twenty-two sections, namely, sections 6, 7, 8, 10 and 21 were vetoed. The Court will note that it is a broad act relating to many matters in addition to public employees.

In 1953, after this Court's decision in *Wieman v. Updegraff*, 344 U. S. 183, the legislature passed chapter 142, Laws of 1953, amending the definition of "subversive person," to make the element of scienter more clear.

In 1955, the Governor, in his message to the legislature, pointed out that "* * * the menace of communism looms as an ever greater threat to the future of the free world than the 'isms' of the past. The United States is giving, and must continue to give, leadership to the non-communist world. To do so, with ever increasing confidence and vigor, our nation must lead from strength, the strength from within that comes from a free people, spiritually strong and functioning through the soundest set of governmental institutions yet developed by man. * * *" (*Senate Journal*, 1955, p. 34.) During this session chapter 377, Laws of 1955, one of the acts in question was passed.

In the years since World War II, the legislature, responding to world conditions, has passed several measures relating to subversive activities. The approach has been pragmatic. It began with a proviso in the budget, followed by a fact-finding committee which was discontinued two years later. After the Korean conflict began a comprehensive act was passed, which in turn has been twice amended. The pattern was formed over many years and was based upon experience. No such legislation has been passed in almost a decade.

B. Prior Litigation

The 1955 Act was unsuccessfully attacked in 1955 by two University of Washington professors. They prevailed in the State Superior Court, but the federal constitutional questions which they raised in that case were decided adversely to them by the Washington State Supreme Court. *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10. The plaintiffs there, who were professors with tenure at the university, appealed to this Court. This Court vacated the decision of the State Supreme Court and remanded the case for consideration of the question of whether state employees required to sign such an oath are entitled to a hearing at which refusal to take the oath could be explained or defended. *Nostrand v. Little*, 362 U. S. 474. Pursuant to this remand, the Washington Supreme Court answered the question in the affirmative. *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551. As to all other issues involved in the case, the State Supreme Court adhered to the views expressed in its earlier opinion.

An appeal was again taken to this Court. On January 22, 1962, this Court granted the State Attorney General's motion to dismiss. This Court dismissed the appeal "for want of a substantial federal question." *Nostrand v. Little*, 368 U. S. 436.

C. The Oaths

The Court has before it two oath requirements. The oath required by the 1931 statute is promissory

in form, while the 1951 statute, as amended by the 1955 statute requires a disclaimer oath. In the former, the person taking oath promises *inter alia* to support the constitution and to promote respect for the flag. Only teachers need take this oath. In the latter, one disclaims *inter alia* present membership in certain organizations and disclaims the commission of certain acts relating to violent overthrow. All state and local employees and officials must take this disclaimer oath.

This is not the proper place to trace the history of the oath. (This was done very admirably by Professor H. Silving in 68 Yale L. Jour. 1329.) It is sufficient here to point out that the history of the oath goes back to the pre-religious, even the pre-animate period of culture. The oath was thought by primitive man to be a vehicle of magic power. Despite the fact that the oaths before the court have little or no resemblance to their early ancestors it is small wonder that even today the term "oath" or "loyalty oath" is heavily charged with emotion. The word "affidavit," stemming from the Latin, has the same meaning but lacks the connotations. But "loyalty oath" and "oath of allegiance" are the terms in popular use.

The 1955 statute does not prescribe any particular oath forms. The state attorney general has provided a suggested form to the state printer. This suggested oath form has been revised at least twice by the state attorney general. The state printer in turn supplies the oath forms to various agencies.

Some large agencies print their own oath forms, other agencies combine the oath form with an application form. Oaths are kept on file with the employing agency. Regents are unaware of any discharge based on refusal to sign the oath.

A person taking the oath swears to two facts: that he is not a subversive person as defined in the Act, and that he is not a member of the Communist Party or of any other subversive organization. Only the second fact is required by the 1955 Act. The former stems from sections 11 and 12 of the 1951 Act.

Section 13 of the 1951 Act concerns non-sensitive positions. No claim is made by Employees that the positions involved in this case are, or should be, non-sensitive.

The oath requirement contemplated by section 1 of the 1955 Act looks to the present. Thus, it is possible for a communist to resign from the Communist Party today and take the oath tomorrow. Unlike other oath requirements before this court past membership is not involved.

The oath so clearly satisfies the scienter requirements as a result of statutory amendment (chapter 142, Laws of 1953), judicial interpretation (*Nostrand v. Balmer, supra*, at p. 460, 470, 476 and 484) which this court must "accept without question" *Cramp v. Florida*, 368 U. S. 278, and the form of the oath itself, that Employees have made no claim that scienter is lacking. *Wieman v. Updegraff*, 344 U. S. 183 is, as a result, not applicable.

The oath requirement is pinpointed to a particular group, public employees, with regard to which the legislature not only has the right but the duty to set up qualifications. No attempt was made to cover a person not a public employee or official as in *Speiser v. Randall*, 357 U. S. 513.

D. The "Refusal" to Sign

Regents proffered the oaths to the Employees and allowed them until October 1, 1962 to sign. Prior to October 1, 1962 the lower court enjoined the University from demanding the completion of the oaths, an injunction being presently in force. Hence, as the lower court noted, "Enforcement of the statutes by University officials, while clearly intended, is still prospective as a result of this litigation." (R. 241). Thus, there is nothing preventing any Employee from changing his mind today and deciding to take the oath, dispite his vehement statements of intention. (See R. 203.) Thus, the word "refusal" when it occurs in the pre-trial order and in the lower court opinion must be seen in the light of a threat, avowal, or statement of intention, subject to change at any moment, not as an actual irrevocable refusal. There is, at present, not one refusal on which discharge could be predicated. The "refusal" of the Employees is not an operative fact. In other words the demand for information is a certainty (and the First Amendment argument should be seen in this light) and the continued refusal and possible discharge is only a possibility (and the Fourteenth Amendment argu-

ment should be seen in this light). The question of whether there is an actual controversy is discussed in Part IV.

On May 28, 1962 a memorandum from the office of the President of the University of Washington to all members of the staff of that university was distributed. This memorandum provided in part as follows:

> "* * * To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, a check of the personnel records of the University is in process so that those persons who have not previously sworn to the required oaths may be requested to do so. These requests will be submitted as soon as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, compliance will be requested by October 1, 1962, with notification that in the event of failure to comply, employment will be terminated 30 days later as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign." (R. 173)

This was further elaborated by the Provost of the University of Washington in a memorandum of June 4, 1962 directing university deans, directors and chairmen of departments to begin administering the oaths:

> "It is evident that the task of obtaining all of these notarized signatures will be protracted and time consuming. Therefore, I am sending

to you in this mail a supply of Oath Forms A and B with the suggestion that those who wish to complete the form prior to the October 1, 1962 deadline be encouraged to do so since it will reduce the costs of administration in meeting statutory requirements if as many persons as possible will complete the form in the course of the summer and thus reduce the 'crash' clerical operation which would otherwise have to be faced near October 1, 1962." (R. 163)

However, on June 25, 1962—several months prior to the October 1, 1962 deadline—a temporary restraining order was signed ordering that the Regents be "temporarily restrained from enforcing Chapter 103, Laws of 1931 and Chapter 377, Laws of 1955, of the State of Washington, by requiring the plaintiffs or others similarly situated to execute either Oath Form A or Oath Form B, * * *" (R. 36). On February 26, 1963 the three-judge district court ordered that "the enforcement of the judgment heretofore entered will be stayed for sixty days, subject to extension of the stay until final disposition of the case by the Supreme Court of the United States * * *" (R. 264).

There can be no legal refusal as long as there is no demand. And there can be no demand as long as the injunction is in force.

E. The Employees

Two observations should be made. The record is silent as to the contract provisions of any of the Employees, although the Washington Supreme Court has indicated that these may be important in deter-

mining the nature of an employee's hearing rights. Second, Employees, by the very definition of the word, are not applicants. Thus, the question of the 1931 statute and the 1955 statute with regard to applicants is not before the Court.

PART II

SUMMARY OF ARGUMENT

The Employees cannot challenge the constitutionality of the provisions of the 1951 Act indirectly by challenging only the 1955 Act and the actions of administrators acting within the scope of the 1951 Act, as amended.

Despite the fact that the Washington Supreme Court has twice construed the 1955 Act with regard to tenured professors, the number and variety of questions not before that court which Employees are asking this Court to resolve, the declaratory nature of the case, the fact that the act under consideration is amendatory in nature, and especially the fact that there has been no actual refusal to sign, all lead to the conclusion that the questions relating to the disclaimer oath are not ripe for decision. With regard to the 1931 oath, this Court should affirm the lower court's decision to exercise equitable abstention. There has never been any litigation involving the validity of this oath, the present case alone excepted.

Neither the 1931 oath requirement nor the 1955 oath requirement involves a violation of the First

Amendment, as made applicable to the states by the Fourteenth Amendment. A distinction must be made between the state's constitutional right to demand certain information on pain of possible loss of employment (which involves First Amendment considerations) and the form and method by which the information is demanded (which involves the Fourteenth Amendment considerations). With regard to the former, precedent strongly supports the validity of the oaths. The Court's decisions in *Beilan v. Bd. of Education*, 357 U. S. 399, *Adler v. Bd. of Education*, 342 U. S. 485, and *Garner v. Bd. of Public Works*, 341 U. S. 716,—quite apart from the matter of the form of the inquiry—certainly hold that the inquiry may be made as a reasonable condition of employment to maintain the integrity of the civil service.

The 1931 Act does not violate the First Amendment because the state has a substantial and direct interest in having teachers who will inspire loyalty toward country on the part of students. In this regard there is a sharp distinction between the case at bar and *W. Va. State Board of Education v. Barnette*, 319 U. S. 624, since the latter case did not relate to a group, such as teachers, where special qualifications are involved, but rather to students. In this respect *Barnette* resembles *Speiser v. Randall*, 357 U. S. 513, in that the state attempted to set up a certain requirement affecting a broad segment of the public without demonstrating a convincing societal need.

The 1955 Act is not an unconstitutional prior restraint. *Shelton v. Tucker*, 364 U. S. 479, has no bearing on the present case since in the present case the means used by the state to effectuate its legitimate interest in combating subversion are reasonably tailored for this purpose.

The oaths do not violate the First Amendment guarantees on religion: They neither constitute a religious function nor do they, based upon *Re Summers*, 325 U. S. 561, interfere with the free exercise of religion.

The two reports of the Washington State Un-American Activities Committee leave no doubt that the interest to be protected is substantial. This Court has held in such cases as *Garner*, *Adler*, and *Douds*, all *supra*, that the societal interest in safeguarding the teaching profession against disloyalty and protecting against political strikes is substantial, indeed, and justified the means used to protect such interest.

Given the fact that a societal interest exists there can be no question that the means used are reasonably related to the protection of this interest; for the existence of a criminal sanction might give the subversive employee pause before signing the disclaimer oath.

Neither the 1955 Act nor the 1931 Act violates the Fourteenth Amendment. There is no violation of procedural due process since employees with academic tenure certainly are entitled to a hearing.

Employees with civil service tenure or no tenure at all are probably entitled to a hearing. The former group would probably be entitled to a hearing as a result of the State Civil Service Act (chapter 1, Laws of the State of Washington 1961) while the latter group would probably be entitled to a hearing as a result of the Administrative Procedures Act (chapter 234, Laws of the State of Washington 1959). There are indications that the Supreme Court of Washington would construe the Subversive Activities Act along with these more recent acts. Since a hearing will be available to the Employees it is not necessary to rely upon cases involving imposition of a civil disqualification without a right to a hearing. The question of whether an employee who refuses to sign the oath required by the 1931 Act would be entitled to a hearing is a matter for conjecture.

The 1955 Act is not unconstitutionally vague. *Cramp v. Florida*, 368 U. S. 278, is not applicable since the language of the oath involved there is much broader than the language involved in the present case. This Court has upheld penal statutes containing language roughly comparable to that involved in the present case. Once it is determined that the statutes are not void on their face this Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems. The words used in the Subversive Activities Act, as amended, in no way render illegal or questionable the activities and associations

listed by the Employees. This, combined with the high measure of proof necessary to convict one of perjury, shows that Employees' fears of conviction of perjury are without a reasonable basis.

It cannot be argued that the 1931 Act is so vague as to render it unconstitutional since a violation of the oath, it being promissory in form, is not a crime. The 1955 Act and the 1931 Act do not involve an unconstitutional shifting of the burden of proof, since *Speiser v. Randall*, 357 U. S. 513, is not applicable; the present case involves public employees, a group specifically excepted by the Court in *Speiser*; it does not involve a segment of the general public, such as veterans, which bears no relation to a specific societal need such as combating disloyalty among public employees. The 1931 Act has been interpreted as being not applicable to aliens. However, employees who are citizens cannot claim that they are denied equal protection of the laws since it would be unfair to ask aliens as well as citizens to "promote * * * undivided allegiance to the government of the United States."

Nor are other contentions of the Employees valid. The oaths are not Bills of Attainder since they do not involve punishment but rather a qualification for employment. In addition they look to the present, they are not retrospective.

The pre-emption argument based upon *Pennsylvania v. Nelson*, 350 U. S. 497, is not valid because that case has been reduced to its precise facts by

Uphaus v. Wyman, 360 U. S. 72, and *Sweezy v. New Hampshire*, 354 U. S. 234.

The 1955 Act does not violate the constitutional prohibition against self-incrimination; for the Employees are not asked to testify against themselves. They must, however, comply with the standards of eligibility established by the legislature. There is no inquiry into past conduct. Finally, the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against state action.

The district court was correct in dismissing Employees' complaint with prejudice since the court decided against Employees on the merits with regard to the 1955 Act. With regard to the 1931 Act the fact that the court invoked the doctrine of equitable abstention would only seem to preclude the Employees from bringing another federal court action. It would force them to go up through the state courts.

Finally, the district court was correct in dismissing the students since the statutes involved here directly affect the Employees but the effect on the students is remote and speculative.

PART III

THE 1951 ACT, AND THE PORTION OF THE OATH BASED THEREON, ARE NOT PROPERLY BEFORE THIS COURT

The Employees are asking this Court to declare portions of the 1951 Act unconstitutional despite the fact that the 1951 statute is not before the Court. One searches the pleadings and the pre-trial order in vain for a clear request that it be declared unconstitutional. Employees have now tried subtly to broaden their attack. Thus the statement is made that "the definitional sections of the 1951 Act, set forth above and *incorporated into* the 1955 Act * * *" (App. Br. p. 34) (Emphasis supplied) In other portions of this brief the Employees have asked this Court to pass on the constitutionality of those very definitional sections. (App. Br. p. 67-78, for example) The Employees have thus begged the question of whether, under state law, the portions of the original statute set out in the amendatory act along with the new matter fall along with the new matter, if the latter is found unconstitutional. The Employees have begged the question of whether, under state law, one may attack the definitional sections "through the back door" by attacking the words defined as they appear in an amendatory act even though the definitional sections, themselves, are not a part of such amendatory act.

One aspect of this broadening attack is presented by the Employees' treatment of criminal sanctions.

One is protected against the imposition of a criminal sanction by a panoply of constitutional guarantees which are not applicable to the imposition of a civil disqualification such as loss of public employment. This is true even though the latter may, on occasion, be more drastic than the former.

Quite apart from the crime of perjury, the 1951 statute contains certain criminal provisions based on knowing membership in a subversive organization which, to be candid, would pose constitutional questions if they were before this Court, in view of *Noto v. U. S.*, 367 U. S. 290 and *Scales v. U. S.*, 367 U. S. 203. Employees have made frequent reference to them as if they had somehow attainted the statutory provisions in question. (App. Br. p. 76 where Employees cite the criminal cases of *Scales*, *Noto*, both *supra*, *Yates v. U. S.*, 354 U. S. 298, and *Dennis v. U. S.*, 341 U. S. 494, as authority for the proposition that a civil disqualification may not be imposed.)

In addition to creating confusion, Employees' failure to challenge the 1951 Act directly creates two serious questions. First, can this Court on this record invalidate the 1951 Act? Second, assuming that the Court cannot, how would invalidation of the 1955 Act affect the 1951 Act?

We submit that the Court cannot invalidate the 1951 Act. Employees have challenged an administrative measure, namely, the oath as formulated, without challenging the statute upon which the administrative action is based. While this type of challenge is common enough where the administrator

has exceeded the bounds of his authority, and is not acting within the scope of his statutory authority, it is surely a rarity where, as here, no claim is made that the action of the administrator is without statutory foundation. On the contrary, they have, by way of argument, attempted to challenge the definitional provisions of the 1951 Act. It would be a bizarre decision which struck down an administrative measure clearly based upon an unchallenged statute; it would be an even more bizarre decision which invalidated a statute not before the court on the basis of an administrative act. A portion of the oath is so directly bound to the 1951 Act, as pointed out earlier, that to challenge this portion of the oath, the Employees must challenge the 1951 Act. This they have not done. This they cannot do for two reasons.

In the first place, Employees did not challenge the 1951 Act in the lower court and may not do so for the first time on appeal. *Shelley v. Kraemer*, 334 U. S. 1. In addition, Employees have not directly challenged the 1951 Act in their appeal to this Court. The question is thus not raised. *U. S. v. Spector*, 343 U. S. 169. The question, at best, lurks in the record, and this is not sufficient. *McNeal v. Culver*, 365 U. S. 190. This Court is rightly reluctant to pass upon constitutional issues which are not squarely presented by the record. *Arkansas Fuel Oil Co. v. La. ex rel. Muslow*, 304 U. S. 197.

The other question to be considered is, how would invalidation of the 1955 Act affect the 1951 Act?

The general rule, supported by Washington cases is: if the amendatory act is wholly invalid, the statute sought to be amended is held to remain in full force and effect. 1 Sutherland, Statutory Construction, 442 § 1937, 3rd ed. 1943. See *North Bend Stage Line v. Dept. Public Works*, 170 Wash. 217, 16 P. (2d) 206, where the state high court said at page 220:

> "* * * These sections, as unamended, provide for review of orders of the department in the superior court substantially as, by these amendments, they provide for such review in this court. * * *"

And at page 228 after holding the grant of direct appeal from the department to the state supreme court unconstitutional, the court said that the amended statutes "* * * remain unsuperseded and unrepealed by chapter 119, Laws of 1931, p. 363 * * *" citing *Corwin Investment Co. v. White*, 166 Wash. 195, 6 P. (2d) 607.

Indeed, in the previous oath case of *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, the Employees admitted as much when on page 85 of their brief to the state high court they unequivocally stated that, "To declare the entire 1955 Act unconstitutional is to leave the 1951 Act totally effective and to eliminate the problems of interpretation."

This, it might be added, would include Section 11, the basic provision making subversive persons ineligible for state and local employment.

Viewed in this light, the Employees' references to the 1951 Act and to the portion of the oath derived from the 1951 Act seem indeed wide of the mark.

PART IV

THERE IS NO ACTUAL CONTROVERSY

THE DISCLAIMER OATH

The two prior decisions by the Washington Supreme Court in no way compensate for the uncertainties created by the premature nature of this case.

Employees repeatedly refer to the two decisions, *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10; *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551, as if they cleared away any doubt regarding the 1955 Act, thereby making this case ripe for decision. But, in fact, these decisions are not all-purpose interpretations capable of resolving the kaleidoscopic legal questions which might arise under the complicated, twice amended 1951 statute. They answer some questions but they raise many more. The decisions illustrate the shortcomings of the declaratory judgment procedure; these occur, through no fault of the court, where broad, sweeping judgments are asked for by counsel even though a substantial bedrock factual basis for such broad judgments is lacking. The result, of course, is that it is sometimes difficult to distinguish the holding of the case from *dicta*. For example, in the two *Nostrand* cases, the court had before it only two plaintiffs, both full professors with tenure. The admissions of fact were brief, almost cryptic. The findings of the state trial court recited that through the professors' "employment contracts and

pursuant to statute and the rules and regulations of the University, plaintiffs have *certain* tenure rights. * * *" (Emphasis supplied) *Nostrand v. Little*, 58 Wn. (2d) 111, 117, 361 P. (2d) 551. After two hearings before the Washington Supreme Court and one before this Court one still knows little more than that the professors "* * * are entitled to a hearing before the tenure committee conducted in the manner prescribed in the applicable rules and regulations * * *" 58 Wn. (2d) at p. 132. One still does not know the scope of Washington Supreme Court's review. One does not know, whether, under the 1951 and 1955 statutes the Washington Supreme Court would reverse as contrary to law a decision on the part of the hearing tribunal and affirmed by the Board of Regents allowing a professor to retain his employment even though he refused to sign the disclaimer oath for reasons of conscience. One knows even less about the result of a refusal to sign on the part of those employees, if any there be, who have neither academic tenure, civil service tenure, nor contract rights as to tenure. One does not know the extent to which the non-academic tenure system and the Administrative Procedures Act would afford hearings to those employees without academic tenure. That the Washington court appreciated the difficulties created, is obvious from the court's statement that even in a declaratory judgment proceeding it is reluctant to rule on a hypothetical situation. 58 Wn. (2d) at p. 119. And, foreseeing how its opinion would

be used, the court expressly stated: "We, of course, limit our consideration of the problem to the facts before us. Even in a declaratory judgment action, there must be a justiciable controversy." 58 Wn. at p. 121. Nor does the court leave for conjecture the question of what the facts are:

> "The material facts shown by the record in the present case as to this hearing issue are that these two professors (who have never refused to take the oath) are presently employed under contract as full professors by the University of Washington, which is operated by the regents. Through their employment contracts, and pursuant to statute and the rules and regulations of the university, they have certain tenure rights. [Footnote omitted] The regents have demanded that the professors sign and swear to an oath (a copy of which is attached to their complaint), and have further stated that, unless the professors complied with such demand, their employment contracts with the university will be terminated by the regents." 58 Wn. (2d) at p. 123.

The uncertainties surrounding this case seem much more numerous than those pointed out by Mr. Justice Frankfurter (dissenting) in *Adler v. Board of Education*, 342 U. S. 485, 497:

> "We are asked to pass on a scheme to counteract what are currently called 'subversive' influences in the public school system of New York. The scheme is formulated partly in statutes and partly in administrative regulations, but all of it is still an unfinished blueprint. We are asked to adjudicate claims against its constitutionality before the scheme has been put into operation, before the limits that imposes upon free inquiry and association,

> the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it. * * *".

This case differs factually from *Adler* in that in *Adler* no oath form was proffered to the teachers. Hence, there was no problem of lack of a "refusal", a problem which exists in the present case. A delay by the Court in *Adler* would not necessarily have caused that case to become more ripe for decision. Whereas, in the present case, an action brought after an actual refusal would settle many questions.

It is true that the statutes in the present case are in effect; but it is also true that no controversy has arisen from an employee's dismissal. Indeed, there is no showing that any employee has ever been dismissed under it. Regents submit, therefore, that this Court should see the Employees' assertions that the definitional sections "have twice been passed upon" (App. Br. p. 34), that the question of the breadth of the definitions had been discussed (App. Br. p. 35) and especially that the amended statute "has been authoritatively construed," (App. Br. p. 35) in this light. The same is true of the Employees' reference to the state supreme court's "expressly stated policy" with regard to the right to a hearing. (App. Br. p. 169)

THE 1931 OATH

The 1931 oath of allegiance statute, chapter 103, Laws of 1931 (RCW 28.70.150 et seq.) requires the professors and other teaching employees at Washington's state universities to subscribe to an oath which reads as follows:

> "I, the undersigned, do solemnly swear (or affirm):
>
> "(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, for reverence for law and order, and undivided allegiance to the government of the United States. * * *"

This statute has never been construed by the Washington Supreme Court. Regents adhere to the position urged below, adopted by the three-judge district court, a position constantly reiterated by this Court, namely: "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipeline Company v. Ideal Cement Comany*, 369 U. S. 134 (1962) and cases cited therein. Regents know of no case where this Court has struck down a state oath requirement without the state high court having had an opportunity to pass on it. Employees point out that *Shelton v. Tucker*, 364 U. S. 479, was an appeal from a three-judge district court (App. Br. p. 138) but a companion case, *Carr v. Young* (same citation), which had been appealed from the state high court was decided at the same time.

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PART V

THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FIRST AMENDMENT

THE CASE LAW IS OVERWHELMING TO THE EFFECT THAT THE DISCLAIMER PROVISION OF THE 1955 ACT DOES NOT VIOLATE THE FIRST AMENDMENT.

This Court has decided no one case involving every issue and every fact presented here but the case law supporting Regents' position is so strong that to combat it Employees must make fine distinctions, distinctions without meaning, and ask the Court to disregard precedent.

Thus, Employees write off *Konisberg v. California*, 353 U. S. 252, and 366 U. S. 36, *In re Anastaplo*, 366 U. S. 82, and *Adler v. Bd. of Ed.*, 342 U. S. 485, as having been decided on the basis of "privilege." (App. Br. p. 57) It is true that, taken alone, certain language on p. 492 of *Adler* and p. 90 of *Anastaplo* seems to speak in terms of "right-privilege," but the cases certainly were not decided on this basis. This Court did not decide that a state could deny the right to practice law to members of a particular race or religion on the theory that state employment is a "privilege" which could be limited in any way, however arbitrary.

Nor can Employees successfully show that *N.A.A.C.P. v. Alabama*, 357 U. S. 449, or *Bates v. Little Rock*, 361 U. S. 516, corrodes *Adler v. Bd. of Ed.*, 342 U. S. 485; for underlying the *N.A.A.C.P.*

decision, where this Court held that a state may not compel the disclosure of N.A.A.C.P. membership lists, is the premise that the *nature* of the organization is decisive. The Court was careful to distinguish *Bryant v. Zimmerman*, 278 U. S. 63, upholding a New York statute requiring disclosure of Ku Klux Klan membership.

Gerende v. Bd. of Supervisors, 341 U. S. 56, involving, as it does, the summary imposition of a civil disability upon a refusal to take an oath is strong authority against the Employees position.

Beilan v. Bd. of Education, 357 U. S. 399, is certainly authority against Employees' position on the First Amendment argument, although it is not applicable to the procedural due process argument.

Most startling of all is Employees' attempt to distinguish *Garner v. Bd. of Public Works*, 341 U. S. 716. The fact is that the petitioners in *Garner* argued the First Amendment points and the Court took note of this on p. 720. But, before coming to grips with the bill of attainder point, it concluded on page 721 that, "This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers v. Mitchell*, 330 U. S. 75, and a State is not without power to do as much." Of course, *Mitchell* revolved largely around a First Amendment argument and the court discussed it extensively beginning on p. 95. It was not necessary for the court to repeat this entire dis-

cussion in *Garner*. Employees are driven to arguing that the Court erred in relying upon *Mitchell* and that the fact that the City of Los Angeles could impose such an oath on its civil servants does not mean that Washington could impose one on its state employees. (App. Br. p. 53)

The Employees have obscured the precedential value of *American Communications Association v. Douds*, 339 U. S. 382, by lumping the two oaths now before the Court together. The 1955 statute has no more "prescribed a state of mind". (App. Br. p. 122) than has the statute involved in *Douds*. In fact, if Employees are to satisfactorily distinguish *Douds* they must be prepared to argue that Congress can impose a civil disqualification to prevent political strikes but a state cannot do as much to combat subversion.

Hence, Employees' attempts to distinguish the foregoing cases are, we submit, unsuccessful.

May the state make the inquiry required by the 1955 Act without violating the public employee's First Amendment rights? The answer must be in the affirmative. *Adler v. Board of Education*, 342 U. S. 485, *Beilan v. Board of Education*, 357 U. S. 399, *Garner v. Board of Public Works*, 341 U. S. 716. Employees' reliance—see for example, page 64 of appellants' brief—upon *Sweezy v. New Hampshire*, 354 U. S. 234, is strange, since the petitioner, Sweezy, willingly answered questions which were roughly equivalent to the statements required by

the 1955 statute. Sweezy denied that he had ever been a member of the Communist Party or that he had ever been a part of any program designed to overthrow the Government of the United States by force or by violence. Thus, the question whether a person could be constitutionally compelled to answer such questions was not even before the Court. 354 U. S. at 239. Questions which Sweezy was directed to answer and which he declined to answer did not relate to his membership in the Communist Party but to his membership in other political organizations, his knowledge of the associations of *other* persons, statements he made in his classroom, and his belief in Communism. Some of the questions were as follows:

> "Was Nancy Sweezy then working with individuals who were then members of the Communist Party?
>
> "Was Charles Beebe active in forming the Progressive Citizens of America?
>
> "Did he work with your present wife—Did Charles Beebe work with your present wife in 1947?
>
> "Did it (a meeting at the home of Abraham Walenko in Weare during 1948) have anything to do with the Progressive Party?
>
> "What was the subject of your lecture?
>
> "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?
>
> "Did you advocate Marxism at that time?
>
> "Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?
>
> "Do you believe in Communism?" 354 U. S. 243, 244.

Because of his refusal to answer these questions, Sweezy was convicted of contempt. His conviction was affirmed by the New Hampshire Supreme Court. On appeal to this Court, the conviction was reversed. This Court did not hold New Hampshire's Subversive Activities statute unconstitutional on its face. The opinions deal with the broad nature of the questions asked by the Attorney General. The questions, four justices held, were improper because it was not clear that they were authorized by the New Hampshire legislature. 354 U. S. at 253. No constitutional question was decided in the opinion signed by these four justices.

Two justices held that the questions infringed upon Sweezy's constitutionally protected and academic political freedoms, but they recognized the distinction between questions concerning *membership* in the Communist Party and questions concerning mere academic classroom references on Marxism, socialism or even communism.

> "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party." 354 U. S. at 266.

The questions were quite different from the statements required by the 1955 statute.

Nor does *Shelton v. Tucker*, 364 U. S. 479 cast a shadow on these cases; for, in that case, on page 485, footnote 4, this Court said, "The actual holdings in *Adler* and *Beilan*, involving the validity of teachers' discharges, are not relevant to the present case."

The Employees' only hope is for a reversal of these cases. But the trend is against them. *Barenblatt v. U. S.*, 360 U. S. 109, 125-134; *Wilkinson v. U. S.* 365 U. S. 399; *Braden v. U. S.*, 365 U. S. 431; *Communist Party v. S.A.C.B.*, 367 U. S. 1, 96-103. The lower court was correct in pointing out that, "It cannot be questioned that a state has power to safeguard the public service from disloyalty; and the right of the state to inquire of its employees concerning their loyalty has been recognized in a number of cases." (R. 242)

Regarding the form of the inquiry, the lower court held (R. 244) that there is no violation of First Amendment rights simply because a written form is used rather than an oral form, such as was used in *Beilan*. The key question is whether the written form is limited to the area of legitimate state concern. The lower court added, "In an institution as large as the University of Washington, to conduct personal interviews of all present and prospective employees concerning their loyalty would be administratively burdensome and might be subject to abuses. In lieu of such inquiry the university officials have elected to require a sworn statement, narrowly limited to the precise matters of legitimate state concern. So limited, the oath serves the same purpose as individual inquiry." (R. 244)

The First Amendment argument of whether the inquiry can be made should be treated separately from the Fourteenth Amendment argument of

whether dismissal can be carried out on the basis of the answer or lack of answer given.

THE 1931 ACT DOES NOT VIOLATE THE FIRST AMENDMENT.

It cannot be denied that *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, would place in doubt the constitutionality of the 1931 Act were the oath required by that act to be taken by students. Only teachers need take this oath, however.

The state has a legitimate interest in setting up qualifications for its public employees, though to do so incidentally affects free speech. In *Barnette*, as in *Speiser v. Randall*, 357 U. S. 513, the state attempted to set up a certain requirement affecting a broad segment of the public. The societal need for qualifications on the part of a particular group such as teachers or labor leaders is greater than the need with regard to the general public.

The efficacy of an oath such as the one required by the 1931 Act is another matter. But may not a legislator reasonably believe that a teacher who signs such an oath would be slightly more inclined to teach in such a manner as to inspire patriotism and loyalty than had he not signed the oath? The answer must be in the affirmative.

THE 1955 ACT IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT.

Citing *Shelton v. Tucker*, 364 U. S. 479, as authority, Employees claim that the 1955 Act is

void as an unconstitutional prior restraint on the grounds that the legitimate state interest could be more narrowly achieved by less drastic means.

Employees rely on *Speiser v. Randall*, 357 U. S. 513. (App. Br. p. 139) This reliance is misplaced for on page 517, footnote 3, this Court stated:

> "Appellants also argue that these provisions are invalid * * * as invading liberty of speech * * * Our disposition of the cases makes consideration of these questions unnecessary."

A prior restraint is not, *ipso facto*, unconstitutional. *Times Film Corp. v. Chicago*, 365 U. S. 43. But it is true that this Court will not allow a state to abridge certain liberties where no substantial state interest is involved by lumping such a measure with a measure combating subversion, a legitimate state interest. Thus a claim that an Arkansas statute is justified because of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools cannot be used as a cloak to cover the attempt of a state to discover whether a teacher is a member of the N.A.A.C.P. *Shelton v. Tucker*, 364 U. S. 479. Nor can one making inquiry pursuant to the investigative powers of a legislature, and again in the guise of combating subversion, force an answer as to belief, abstract advocacy of Marxism, and the like. *Sweezy v. New Hampshire*, 354 U. S. 234.

Employees claim that "the question is whether a fair method has been established," (App. Br. p.

140), and "this Court has held that the state must achieve its legitimate purpose by the method having the least impact on First Amendment rights?" (App. Br. p. 144). What is the authority for this claim? It can hardly be contended that *Shelton v. Tucker*, 364 U. S. 479, is authority for the proposition that a statute is unconstituitonal if the human mind can devise any other means of carrying out the state's legitimate purpose with less restriction of speech; this case is not nearly so extreme. To go to such extremes would be to place an impossible burden on the legislative bodies. Not one of the oaths upheld by this Court would be valid if this were the test, since reflection suggests changes which would bring them into sharper focus. Certainly the Employees paraphrase is a long way from the language used in *Shelton*: "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (364 U. S. at p. 488)

It can be argued that the administrative program provided by Section 12, chapter 254, Laws of Washington 1951 allows the unscrupulous administrator more latitude with the consequent danger to constitutionally guaranteed liberties than does the oath requirement. Yet, Employees claim that this procedure is "less drastic than the oaths." (App. Br. p. 140) But even assuming that the alternative procedures are less drastic, the question is not which method is most preferable, the question is whether

the alternative procedures available create a constitutional barrier to the oath requirement. A legislator might well feel that a statement of Harold W. Dodds, President Emeritus of Princeton University is as applicable to loyalty as it is to scholarship standards:

> "Many presidents feel that the case for academic freedom would be stronger if the academic profession were to match its protective activities by a more positive role in disciplining colleagues who violate professional standards of teaching and scholarship or who are guilty of incompetence, irresponsibility, or downright neglect of duty. * * *" 28 Law and Contemporary Problems 605.

How has this Court applied the "over-broad" test when dealing with past cases?

In *American Communications Assn. v. Douds*, 339 U. S. 382, this Court upheld a system which is a far cry from the "selective" administrative programs referred to by the Employees. The oath provision affected union officials of almost all labor organizations of any appreciable size. It did not affect only those sectors with a history of political strikes. The oath requirement applied to "each officer." (81 Stat. 146, ch. 120, 29 U.S.C.A. 159(8)). The same type of blanket requirement characterized Los Angeles City Ordinance No. 94004, which was upheld by this Court in *Garner v. Board of Public Works*, 341 U. S. 716.

If these oath requirements are valid, no distinction can be found to justify Employees' assertion that an administrative program is the constitutional maximum permitted the Washington Legislature.

State administrative programs in general have not been enforced. (Brown, R. S., Jr., *Loyalty and Security*, p. 99) Nothing in the record indicates that Washington is an exception.

The Washington legislature, then, is not bound to rely upon only a "hit or miss" administrative system. The legislature could legally enact a blanket minimum requirement in the form of the disclaimer oath. (The Court is referred to Part VI relating to the vagueness doctrine for a discussion of whether the 1955 Act includes certain lawful activities and associations of Employees within its ambit. This discussion is applicable to the prior restraint question as well.)

THE OATHS DO NOT VIOLATE THE FIRST AMENDMENT GUARANTEES ON RELIGION.

The Washington oaths are not "prayers," nor do they constitute by any stretch of the imagination a "purely religious function." But this does not satisfy Employees. They claim:

> "Should this Court choose to follow this distinction, characterizing the 1931 and 1955 oaths as 'secular,' then we submit the two oath statutes are unconstitutional as to all appellants, and others similarly situated, in that they prohibit their free exercise of religion and consciences and force them to abridge their consciences, and that this is particularly true of appellants Matchett and Orians." (App. Br. p. 163)

To link the 1931 Oath of Allegiance statute with a denial of religious freedom is also an untenable

argument. The Supreme Court in *Engel v. Vitale*, 370 U. S. 421, carefully distinguished expressions of patriotism from official prayers.

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which includes the Composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." (370 U. S. at page 435, footnote 21).

Re Summers, 325 U. S. 561, supports the validity of the 1931 Act. There, where a bar applicant had refused to take an oath to support the state constitution, this Court held it was not unconstitutional for the state to deny him admission to the bar. This was true even though the state constitution had a provision requiring service in the militia in time of war. The applicant had refused because of his unwillingness based on personal scruples to serve in the state militia in time of war.

If a state can refuse to allow a person to practice law on this ground, surely a state can demand of a teacher, as a condition of employment, the 1931 oath.

THE INTEREST TO BE PROTECTED IS SUBSTANTIAL.

Perhaps the most crucial part of Employees' First Amendment argument concerns the lack of a societal interest to justify the 1955 Act. The Employees must show that the societal interest is not substantial, as in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Employees must somehow get around the two reports of the Joint Fact-Finding Committee on Un-American Activities. This they have attempted to do by claiming that parts of the report are false (App. Br. p. 119), and by claiming that the lapse of six years from the report's filing to the 1955 Act is too long for the findings to support the 1955 Act. (App. Br. p. 120)

The *Second Report Un-American Activities in Washington, 1948*, deals, in the main, with the University of Washington. It would serve no purpose to belabor this point. It is a part of the record. When one considers that the reports comprise several hundred pages, it is surprising that Employees can question only a small percentage of its contents. The bulk of the reports stands undisputed.

There is no blanket requirement that every piece of legislation dealing with subversion be preceded by legislative findings, but it cannot be doubted that valid findings often strengthen the legislation when its constitutionality is called into question. After reciting certain legislative findings on the nature of the communist movement too lengthy to be reported here, this Court in *Communist Party v. S.A.C.B.*, 367 U. S. 1, 94, said:

"It is not for the courts to re-examine the validity of these legislative findings, and reject them. See *Harisiades v. Shaughnessy*, 342 US 580. They are the product of extensive investigation by committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 US 502. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 US 522; *American Communications Asso. v. Douds*, 339 US 382. * * * "

Nor will this Court give less weight to findings of a state legislature which come to the Court "encased in the armor wrought by prior legislative deliberation." *Bridges v. Calif.*, 314 U. S. 252, 261.

Conceding, arguendo, that conditions could change to such a degree as to vitiate a legislative finding, the dangers resulting from the communist movement referred to in the Joint Committee's report (House Journal 1949, p. 1095 *et seq.*) have not disappeared. This court has, in effect, recognized this fact by deciding the *Communist Party* case, *supra*, on June 5, 1961, although it was based on legislation dating from 1950 to 1954. Subversive activities legislation was passed in 1947, 1949, 1951, 1953 and 1955. Argument that any of this legislation is invalid because additional legislative findings were not made after 1949 seems strained, to say the least.

The Reports of the Joint Fact-Finding Committee reinforce what this Court should decide in any event: There is an interest of the state in self-preservation which justifies the action of the legislature. After this Court's decision in *Garner, Adler*

and *Douds*, all *supra*, it is apparent that Employees do not have a valid argument regarding the lack of societal interest to be protected; their argument, if any they have, must be that the means used to protect this interest are unconstitutional.

Once it is decided that the state has a legitimate interest in not keeping in its employ subversive persons, as they are defined in the Subversive Activities Act, as amended, there can be no question of nexus; for however much one may argue that hardened subversives would not hesitate to sign such an oath thus leaving the man of conscience as the victim, the fact is a legislator would be perfectly justified in believing that the disclaimer oath would have a substantial deterrent effect since the criminal sanction might give the subversive employee or applicant pause. "There is some support for this view," writes Professor Ralph S. Brown, "in the history of New York investigations into the loyalty of public school teachers. Some of the witnesses, who in the early 1940's denied communist affiliation before the Rapp-Coudert committee, ten years later found it advisable to plead the Fifth Amendment in response to similar questions from the Senate Internal Security Subcommittee. One proffered explanation for this change in tactics is the availability of sufficient government witnesses in the current investigation to make a criminal prosecution for false swearing stick." Brown, R. S., *Loyalty and Security*, p. 94.

Regents would not even make reference to the discussion (App. Br. p. 142) of the policy of the

University of Washington regarding speakers on the campus—it being not only outside the record but irrelevant as well—were it not for the fact that it is incorrect; the policy referred to was terminated by resolution on January 24, 1964, by the Board of Regents, a date subsequent to the publication of Appellants' Brief.

PART VI

THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FOURTEENTH AMENDMENT

THE EMPLOYEES WHO REFUSE TO SIGN THE DISCLAIMER OATH ARE PROBABLY ENTITLED TO A HEARING.

Employees' argument that the 1955 Act violates procedural due process in that it does not allow a hearing seems to have three bases: The Washington Supreme Court allows no hearing to non-tenured personnel and a sham hearing to tenured personnel; no statute allows such a hearing, and the officials charged with administering the acts will allow no hearing, save the sham hearing resulting from the Washington Supreme Court's decision.

It is true that the statutes, court decisions, and administrative actions are the key factors, but Regents submit that they lead to the opposite conclusion.

The Employees, it will be noted, fall into three different categories: those with academic tenure; those with classified civil service tenure, and those with no tenure at all, save possible contract rights.

The Washington Supreme Court has squarely held that those with academic tenure are entitled to a hearing. This has driven Employees into the extreme position of claiming that the Washington Supreme Court sanctioned a sham hearing (App. Br. p. 172), a position which scarcely deserves argument.

With regard to the other two categories no such categoric answer can be given since the Washington high court has not spoken.

First, what is the rule regarding persons with academic tenure? After *Nostrand v. Little*, *supra*, was remanded by this Court to the Washington high court for determination of whether the professors would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activies act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

But what of persons without academic tenure? Employees' argue that under *Nostrand v. Little*, *supra*, neither the Civil Service Act nor the Administrative Procedures Act could be used to accord Employees a hearing; but in fact, the question of whether persons without academic tenure could take advantage of either act was not before the court. On page 121, the Washington high court tried to preclude just such claims by stating: "We, of course, limit our consideration of the problem to the facts before us."

The real thrust of *Nostrand v. Little*, *supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28.77.120 and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable this would be the case if a person were without tenure.

The two statutes are the Civil Service Act (chapter 1, Laws of the State of Washington 1961) and the Administrative Procedures Act (chapter 234, Laws of 1959). It should be noted that both acts became law some years after the 1955 amendatory act.

It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

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It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

ployee would come under the exceptions to civil service coverage listed in section 5.) Section 5 provides in part as follows:

> "At each institution of higher learning the governing body shall within thirty days after December 8, 1960 designate three of its members as a permanent personnel committee, compensated and reimbursed as provided in RCW 41.06.110, to enforce and perform for all its nonacademic personnel, except those in positions specifically exempted by the governing body on analogy to the exemptions of * * * "

The extract from the minutes of a meeting of the Board of Regents on December 16, 1960, shows that the following action was taken:

> "It was noted that the civil service initiative which was approved by the voters on November 8, 1960, became law on December 8, 1960, and has legal application to the University of Washington. Under this law the Board of Regents is required to appoint three of its members as a Personnel Committee to administer the provisions of the law on the campus. This Personnel Committee will serve as the University Civil Service Board.
>
> "Attention was also called to the fact that there are several items in the law which require action by the Board at this meeting, since such action must be taken before January 7, 1961.
>
> "These are:
>
> "That by January 7, 1961, the Board of Regents shall select three of its members to serve as a University Personnel Committee for terms of two, four and six years (appointments thereafter to be for six-year terms) to administer the provisions of the law.
>
> "That by January 7, 1961, the Board of Regents shall designate a full time nonacademic

employee to serve as Director of Personnel to direct and supervise the Personnel Department and to prepare for consideration by the University Personnel Committee proposed rules and regulations required by the law.

"Upon the recommendation of President Odegaard, the Board appointed Mr. Reginald Root to serve as Director of Personnel and named the following members of the Board of Regents to serve as the University Personnel Committee for terms of two, four and six years, respectively:

"Regent Robert J. Willis, Chairman (two years)

"Regent Harold S. Shefelman, Vice-Chairman (four years);

"Herbert S. Little (six years)."

The University Personnel Committee adopted a number of rules on October 27, 1961, including Rule XIV. This rule makes applicable to those under its jurisdiction the provisions of sections 18, 19, 20 and 21 of the Civil Service Act, which provide for a hearing procedure.

But what of those Employees who are covered by neither civil service tenure nor academic tenure? That the Employees are hard pressed to find a reason why a hearing would not be granted is evidenced by the manner in which the Employees have emphasized certain portions of the Regents' statement. (App. Br. p. 172.) A reading of the document simply indicates that the Regents intend to follow the law, it does not indicate that under the law no hearing would be accorded an employee. Likewise on page 173 of their brief, Employees have italicized the

words "on any grounds" found in the 1955 Act. The effect would have been very different if they had italicized the following three words, "*shall be cause* for immediate termination * * *" (Emphasis supplied.) There is, of course, a great difference between a matter being a cause for immediate termination and a matter which must result absolutely in immediate termination.

These Employees are probably entitled to a hearing under the Administrative Procedures Act. It is not a certainty because it has never been passed upon by the Washington Supreme Court. This Court will, of course, assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems where such interpretation is possible. *Fox v. Washington*, 236 U. S. 273.

Until this is done it is the intention of the state to allow a hearing on the assumption that it is better to err by allowing too much due process rather than too little. Nor is there anything novel about such an approach. In regard to the third factor, state agencies have, upon the advice of the state attorney general, on numerous occasions accorded a hearing to a party on the basis of the Administrative Procedures Act where no specific hearing is provided by statute. An example of this is *In re Christensen*, No. 84575 Thurston County Superior Court, State of Washington. In this case the director of licenses granted a hearing to an applicant who had been refused a broker's license even though such a hearing was not

specifically provided by the Real Estate Licensing Act (chapter 18.85 RCW).

There are undoubtedly times when a hearing would seem appropriate. For example, if an individual attempted to resign from a subversive organization by communicating with one of the members, it is possible this individual would not be sure whether his resignation was effective, since many of such organizations not having membership cards and lists. If such an individual were to ask for a hearing so that he might explain the steps he had taken to attempt to resign it seems probable that the hearing would be allowed under Washington law and administrative practice.

To prevail on this point, Regents need not show that a hearing is definitely required by the statute. They need only show that such a possibility cannot be ruled out. *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 136. The Employees should not be permitted to profit from the uncertainties arising from this action because of its premature nature.

Since a hearing is probably accorded under Washington law, it is probably not necessary for us to rely upon cases upholding the imposition of a civil disqualification with no right to a hearing, such as *Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441, *Gerende v. Board of Supervisor of Elections*, 341 U. S. 56, *United Public Workers v. Mitchell*, 330 U. S. 75, *American Com-*

munications Association v. Douds, 339 U. S. 382, and *Cafeteria Workers v. McElroy*, 367 U. S. 886.

How might this act provide such a hearing? Section 9 provides in part: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. * * *" Section 1 defines a contested case as "* * * a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or *constitutional right* to be determnied after an agency hearing." (Emphasis supplied.)

Gnecchi v. State of Washington, 58 Wn. (2d) 467, 364 P. (2d) 225, a case decided *en banc* a few months after *Nostrand v. Little*, *supra*, went beyond what was strictly necessary to reach its holding to indicate that under the Administrative Procedures Act, such an employee would be provided a hearing if the lack of a hearing would deprive him of a constitutional right. The court seemed to be following the lead of this Court. (See *Wong Yang Sung v. McGrath*, 339 U. S. 33.)

One final uncertainty with reference to the disclaimer oath should be mentioned. The record is silent as to the provisions of any employment contract. It is impossible to determine, therefore, whether any of the Employees would acquire any hearing rights in this way.

WHETHER AN EMPLOYEE WHO REFUSES TO SIGN THE 1931 OATH WOULD BE ENTITLED TO A HEARING IS A MATTER FOR CONJECTURE.

It cannot be denied that a literal reading of the 1931 statute indicates that there is less chance that a person refusing to sign the oath it requires would be afforded a hearing than would be the case with the disclaimer oath; yet if the Washington Supreme Court were to read the 1931 statute *in pari materia* with some other statute, such as the Civil Service Act or the Administrative Procedures Act the result would hardly be more surprising than that court's holding in *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551, on the hearing issue. This leads again to the question of whether the case is ripe for decision, whether there is an actual controversy. (The Court is referred to Part IV for a discussion of this question.)

THE 1955 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

In dealing with this question (App. Br. pp. 186-192), Employees' difficulty comes not from stating the general rules but from attempting to apply the general rules to this particular case.

The oath required, and the statutes on which it is based, are not unconstitutionally vague; the terms used therein are susceptible of objective measurement.

Employees have quoted no cases which militate against the validity of this oath. *Cramp v. Florida*,

368 U. S. 278, relied upon by Employees on page 192 of their brief is not applicable, for the oath involved in *Cramp* can hardly be compared with the oath in the present case. The former oath provides in part, "* * * that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party * * *". The Court, itself, seems to have distinguished this case from *Cramp* when, on page 286 it pointed out that:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or Federal Government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms *susceptible of objective measurement*." (Emphasis supplied.)

This Court denied certiorari in a case involving alleged vagueness of the Obey Act which, as pointed out earlier, is very similar to the 1951 Act. *Shub v. Simpson*, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861. Also significant, is the fact that this Court affirmed *Gerende v. Bd. of Supervisors*, 341 U. S. 56, a decision based upon the *Shub* interpretation. But even more significant is the fact that this Court has affirmed prison sentences—a far cry from this declaratory judgment procedure—stemming from statutes resembling the Subversive Activities Act. One example is the Smith Act, 54 Stat. 671, 18 U. S. C. 2285 (Supp.), as amended. The statute reads in part:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, neces-

> sity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence. * * *
>
> "Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both. * * *"

Dennis v. United States, 341 U. S. 494, sustained this statute in the face of an allegation, *inter alia*, that it was unconstitutionally vague. In rejecting the contention, the Court said:

> "We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness * * *
>
> "* * * We think [the statute] well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand."

Regents submit that if a criminal statute can make it unlawful to "advocate * * * abet * * * advise * * * or teach * * * the violent overthrow * * * of the government of the United States or the government of any State * * *" without doing violence to the principle of unconstitutional statutory vagueness, a state is free to require an oath in approximately those terms without doing violence to that principle.

While to set forth other statutes would make this brief unduly prolix, the Court is referred to the statutes involved in *Gitlow v. N. Y.*, 268 U. S. 652, and *Whitney v. Calif.*, 274 U. S. 357. This Court refused to strike down oaths and the statutes upon which they are based, which are much more questionable than those in this case. (*Garner v. Bd. of Public Works*, 341 U. S. 716; *American Communications Association v. Douds*, 339 U. S. 382.)

It is not necessary to set forth the lower court's discussion relating to vagueness. (See, R. 245.) The fact that a unanimous three-judge court found that the meaning was not uncertain or vague—in any event not to the extent that the statute must be held unconstitutional—is itself persuasive that the statutes are not void on their face. The lower court pointed out that a person taking the oath, " * * * is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed." He need only apply them to his own case. (R. 246.)

Although the subject of subversion is susceptible to overdramatization, it should be pointed out that based upon the history of other nations, a statute would be of little use which included within its ambit only those who participate in the *putsch* itself. It must also include those who provide assistance by supplying weapons and the like. Second, an insurrection is not the work of one man and; as a result a statute, to be of any use, cannot include only those who *alone* carried out the attempted *coup d'etat*.

It would avail Employees little to attack the word "revolution," found in the 1951 statute as being ambiguous by claiming that "revolution" could involve a peaceful and constitutional change; this is so because even if this word were found unconstitutional, only the word would be stricken under the state high court's ruling in *Household Finance Corp. v. State*, 40 Wn. (2d) 451, 244 P. (2d) 260. The companion words "force or violence" would remain.

The cases cited by Employees illustrate the general rule regarding vagueness. Employees have cited no cases—indeed, there are no such cases—to show that the 1955 statute is vague. Thus the parade of "horribles" they cite of, "any gang", *Lanzetta v. N. J.*, 306 U. S. 451, "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime," *Winters v. N. Y.*, 333 U. S. 507, "displays a red flag * * * or device of any color * * * as a sign * * * of opposition to organized government. * * * ", *Stromberg v. California*, 283 U. S. 359, and "lend my aid, support, advice, counsel or influence to the Communist Party," *Cramp v. Florida*, 368 U. S. 278, are distinguishable from the 1955 statute.

Once it is determined that the statutes are not void on their face, *Fox v. Washington*, 236 U. S. 273, is applicable, holding that the Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional problems where any such interpretation is pos-

sible. See also *Shuttlesworth v. Birmingham Bd. of Ed.*, 358 U. S. 101. Our state high court would of course, be guided by Section 19 of the 1951 Act which provides in part that, "Nothing in this act shall be construed * * * to limit or infringe upon freedom of the press or freedom of speech or assembly within the meaning and the manner as guaranteed by the Constitution of the United States * * *"

In order to judge whether either oath is a prior restraint in violation of the First Amendment or void for vagueness under the Fourteenth Amendment it is necessary to match the wording of the oaths against the activities and associations of the Employees. The activities and associations of all of the Employees are not set forth in the record; it is, however, possible to assume that in the series of statements of several of the Employees (R. 188-218) the Employees have set forth those associations and activities, in their opinion, most likely to be considered subversive.

Initially it must be conceded that the Employees' statements to the effect that they do not feel they can sign either oath for reasons of conscience cannot be rebutted. The same is true of their belief that the oaths are illegal under the Federal constitution and their belief that signing the oaths would subject them to perjury. But the question of whether the fear of perjury is well-founded is quite another matter. It is not necessary to discuss the affidavits one by one since the affidavits resemble

each other in that the fear of perjury rests on a few types of associations and activities. These activities are working and exchanging information with scholars of countries having a Communist government, editing or contributing to an international scholarly publication and attending academic conferences held under the auspices of a Communist government. The final activity which some of the Employees felt would subject them to perjury was discussing controversial subjects such as the non-recognition of Communist China. (R. 204.)

The organizations listed are nearly all international academic organizations.

It is clear that once the opinions of the Employees as to the legality of the oath and the wisdom of the oath are pared from their affidavits the remaining activities and associations mentioned could by no stretch of imagination result in a conviction for perjury. (A hearing procedure is available, but Regents submit that there would be no risk of perjury to Employees even if there were no hearing procedure to resolve doubts in the borderline area.)

The fact is that the Employees would be remiss in their duties in most cases if they did not belong to these international academic organizations and if they did not write for international publications, or if they did not exchange information of an academic nature with scholars in the same field wherever such scholars may be found, or if they failed to discuss controversial political subjects, statutes and episodes

in history in which, in the opinion of the teacher, the United States acted wrongly. There is no showing that any of the organizations to which the Employees belong "engages in or advocates, abets, advises or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government. * * *" (RCW 9.81.010(3))

It is true that two individuals claim they cannot sign the oath of allegiance because it would conflict with their foreign citizenship. (R. 200, 215) However, in Part VI of this brief Regents have shown that non-citizens have not been requested to sign the oath of allegiance in its statutory form, that they are not at present required to do so and that there is no indication that they will in the future be required to do so.

The point is made that some of the information gained by a Communist government has possible military application. (R. 57) Admittedly, if the test were, does the exchange of information constitute, aid, support, counsel or advice to the Communists, as was true in *Cramp v. Florida*, 368 U. S. 278, the constitutionality of this statute would be more difficult to defend. This, however, is not the test, since the 1955 Act sets forth much more specific requirements.

Nor can it be said that one who engages in the activities set forth by the Employees "aids in the

commission or advocates, abets, advises or teaches by any means, any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration" of our constitutional form of government by "revolution, force, or violence." (RCW 9.81.010(5)) Where the Florida statute speaks of "lending aid, support, advice, counsel or influence," the Washington statute speaks in terms of aiding the commission of specific acts of violence. Thus it is clear that the actual threat of a perjury conviction is very different from the Employees' fear of such conviction.

"'Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted.'" (*State v. Wallis*, 50 Wn. (2d) 350, 311. P. (2d) 659 (1957).) After starting its opinion with the above quote the Washington Supreme Court proceeded to point out, quoting an earlier case, that to convict one of perjury:

> "'There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.'" (50 Wn. (2d) at p. 353)

This statement of the Washington Supreme Court as to the great quantum of proof necessary to convict one of perjury underscores the lack of a reasonable basis for the Employees' expressed fear.

THE 1931 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

Employees assert, as if it were a fact, that "any affiant who subscribes falsely to the statutory oath of undivided allegiance, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010, et seq.)," (App. Br. p. 29) The statute cited is the state's perjury statute.

But is is *not* a crime to violate the oath. The oath provides, "I . * * * will support . * * . * and will * * * promote. * * * " It is thus promissory in form. It is not a disclaimer oath. One promises to do certain things in the future. Can a man go to jail for failing to carry out his promises? No, according to any legal authority Regents have found. The rule is found in 70 C. J. S. 462, Sec. 6, Perjury: "A promissory statement ordinarily cannot constitute perjury or false swearing * * * ordinarily it is held that an official oath cannot be the subject of perjury in so far as such oath involves statements purely promissory." If the legislature had provided a specific penalty for breach of this promissory oath the rule would not apply. The rule is set forth in *State v. McCarthy*, 38 N. W. (2d) 679, 686 (255 Wis. 234):

"The official oath to which the defendant subscribed does not affirm the present existence of a fact, and relates to the future conduct of the affiant. The affiant solemnly promises that *he will* support the constitution of the United States and the constitution of the State of Wisconsin, and that *he will* administer justice without respect to persons, and that *he will* faithfully and impartially discharge the duties of his office. Such an oath is called a promissory oath. * * *

"Violation of an oath of office does not constitute perjury as that offense is defined in the law. * * *

"In 1 Hawkins, P. C. 431, first published in 1716, a standard text on English criminal law, the rule is stated thus:

" 'Also from what has been said it appears that the notion of perjury is confined to such public oaths only as affirm or deny some matter of fact contrary to the knowledge of the party; and therefore, it doth not extend to any promissory oaths whatsoever. * * * '"

The fact that it is no crime for a person to violate this oath is the death of Employees' argument that the 1931 statute violates the due process clause because of vagueness. Employees have not produced one case where this Court struck down a statute due to vagueness involving a sanction or lack of sanction comparable to the present case. On the contrary, the cases dealing with vagueness involve a criminal sanction or sanction such as deportation even more drastic than many, if not most, criminal sanctions. (*Jordan v. De George*, 341 U. S. 223. See the annotation, "Indefiniteness of language as affecting validity of criminal legislation—Supreme Court cases," 98 L. Ed. 374.)

THE 1955 ACT AND THE 1931 ACT DO NOT INVOLVE AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF.

Citing *Speiser v. Randall*, 357 U. S. 513, as authority, Employees claim that the 1955 Act involves a denial of procedural due process in that it shifts the burden of proof to the public employee. (App. Br. pp. 182-186) While the Employees' argument might have merit were the oath demanded of the public in general, it has no merit where, as here, the oath requirement is directed to a specific group, to wit, public employees. A much more substantial societal interest exists where a state inquires into the loyalty and fitness of its public employees than where a state inquires into the loyalty and fitness of veterans, or members of a particular race or religion.

The petitioner in *Speiser* prevailed in this Court because of an unconstitutional allocation of the burden of proof in a tax exemption proceeding. This Court went to great lengths to distinguish certain disclaimer oath cases involving a specified group where the oath requirement is backed up by a substantial state interest. Specifically, this Court on page 527, with reference to *Garner v. Bd. of Pub. Wks.*, 341 U. S. 716, *Gerende v. Board of Supervisors*, 341 U. S. 56, and *American Communications Association v. Douds*, 339 U. S. 382, said, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of gov-

ernmental concern." On page 528 the Court said, "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct." The *Speiser* case, then, cannot be used as authority to support the claim that the 1955 Act involves a deprivation without procedural due process.

Since violation of the oath required by the 1931 Act is not a crime, the very concept of "shifting the burden of proof" would not seem to apply. A bare promise, the breach of which involves no criminal sanction, would hardly suffice to shift the burden of proof.

THE 1931 ACT INVOLVES NEITHER A DEPRIVATION OF SUBSTANTIVE DUE PROCESS NOR A DENIAL OF EQUAL PROTECTION UNDER THE LAW.

By drawing attention to certain parts of the pre-trial order, Employees, on pages 102 and 103 of their brief, have given the impression that aliens are forced to take the oath required by the 1931 Act.

This is not, in fact, correct. This is not the practice of the University of Washington and has not been the practice.

The pre-trial order must be read as a whole. Thus the statement of the President of the University of Washington (R. 175-179) and another paragraph of the pre-trial order (R. 159) must be read along with the portion where aliens are treated specifically. It reads, "For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and *at all times material to this cause*, has been *similar* to that suggested by the memorandum circulated through the department of Mathematics and reproduced below." (Emphasis supplied.) The memorandum referred to points out that, "The last clause of the first sentence which reads, 'and undivided allegiance to the government of the United States' may be replaced by the phrase 'insofar as it is compatible with my citizenship in .....'" (R. 158-159). Who can say what other oath form would be "similar"? Yet, on page 103 of their brief, Employees actually state, "* * * the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors. * * *" This Court cannot pass on a "modified" oath, which is "similar" to the one set forth in the above memorandum. One thing is certain. The very word "modified" means that it is *not* the 1931 oath.

Thus, Employees' claim that this oath is arbitrary and hence void under the due process clause,

in that it requires aliens to take an oath of undivided allegiance to the United States, thereby placing them in the inconsistent position of averring undivided allegiance to one government while retaining the citizenship of their native country, falls of its own weight.

It is at least arguable that the legislature intended the words, "every person applying for a license to teach . . . ." to cover not "every person" in the broadest sense but every person who should owe allegiance to this country. It is to be noted that legislation was enacted prohibiting aliens from teaching *in the common schools* (chapter 38, Laws of 1919, RCW 28.67.010, *et seq.*) Three decades later, chapter 32, Laws of 1949 (RCW 28-.67.020, part) amended Section 1 of the 1919 act to allow exchange teachers *in the public schools* "irrespective of requirements respecting citizenship and oath of allegiance." Neither statute referred to institutions of higher education. This demonstrates that the Washington Legislature in 1949 assumed that the 1931 act did not apply to institutions of higher education. But, of course, whether the long-standing interpretation of the 1931 act by the administrative agencies—even though it is entitled to great weight—is the correct interpretation, is a question for the state courts.

Employees claim (App. Br. pp. 100-101) that if the 1931 oath does not apply to aliens as well as citizens the latter have been denied equal protection

of the laws. The question in all "equal protection" cases is whether a reasonable basis for an allegedly unconstitutional classification exists. *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376; *Daniel v. Family Security Life Insurance Co.*, 336 U. S. 220; *N. Y. Rapid Transit Corp. v. City of New York*, 303 U. S. 573. The classification here is not only reasonable but tends to avoid possible unfairness to alien employees without in any way derogating from the constitutional rights of non-alien employees since the oath of allegiance as applied to them creates fewer problems.

PART VII

OTHER CONTENTIONS OF EMPLOYEES

THE 1955 OATH REQUIREMENT DOES NOT CONSTITUTE A BILL OF ATTAINDER.

The omissions made by Employees' in interpreting *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, and *United States v. Lovett*, 328 U. S. 303, demonstrate the invalidity of their argument that Washington's disclaimer oath requirement is a bill of attainder.

Employees admit that the oath in this case is prospective and cite no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Cummings* and *Lovett* cases and in *Ex parte Garland*, 71 U. S. (4 Wall.) 333, all involved punishment for past misdeeds. It is true that the punishment for past misdeeds was often

conditioned on a future act, but in each case the individual punished could not have avoided the sanction. As one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

The Employees', on page 103 of their brief have used, completely out of context, a quote from Justice Frankfurter's concurring opinion in *United States v. Lovett*, *supra*, to support their argument that a bill of attainder need not also be *ex post facto* in order to be objectionable. An additional few lines from that opinion demonstrate that the Employees' quote is not apposite. At page 323 of *U. S. v. Lovett*, Justice Frankfurter wrote:

> "Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. *But if it is not an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.*" (Emphasis supplied.)

Whether or not that statement was applicable in the *Lovett* case, we submit that it is certainly applicable in the present case. In other words, the fact that the statutes involved in the present case are prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign from a subversive organization as a condition of his employment by the state. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Employees wholly ignore the Washington Supreme Court's interpretation of the 1955 Act and the constitutional prohibition against bills of attainder. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10 (1959), the Washington Supreme Court followed *Garner v. Bd. of Public Works*, 341 U. S. 716, where this Court said on p. 720:

> "* * * The provisions operating thus *prospectively* were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service * * * *and a State is not without power to do as much.*" (Emphasis supplied.)

The fact is that the oath requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra;* for here a member of a subversive organization may resign today and take the oath tomorrow. Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

If the oath was an employment qualification in the *Garner* case, it is an employment qualification here. In the *Douds* case, *supra*, the Court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations. If the oath was valid as regulating future conduct in the *Douds* case, it is so in the present case.

The Employees' brief contains considerable discussion about Bills of Attainder being prospective. However, there is a dearth of argument to show that the affidavit requirement constitutes a Bill of Attainder even assuming, *arguendo*, that one could be prospective. To begin with, Employees have not shown any punishment and punishment is certainly a prerequisite. Employees have shown nothing to negate the belief of the lower court that the oath requirement is a reasonable employment qualification. As Mr. Justice Frankfurter said in his concurring opinion in *United States v. Lovett*, *supra*, on page 324:

> "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker v. New York*, 170 U. S. 189, or because he is no longer qualified, *Dent v. West Virginia*, 129 U. S. 114."

Hence, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

It is submitted that there is no merit to Employees' contention.

THERE HAS BEEN NO PRE-EMPTION OF THE 1955 ACT.

The holding in *Pennsylvania v. Nelson*, 350 U. S. 497, so heavily relied upon by the Employees, has been reduced to its precise facts by *Uphaus v. Wyman*, 360 U. S. 72, 76-77 and *Sweezy v. New Hampshire*, 354 U. S. 234.

The portion of the state statute involved in the pre-emption argument in the *Sweezy* and *Uphaus* cases, *supra*, is the same as Washington's. The *Uphaus* case in 1959 is the last case to discuss "pre-emption." There the Court stated that the pre-emption contention "was denied *sub silentio*" in *Sweezy*,

and thus, with these comparable statutes under consideration, the pre-emption argument appears foreclosed to Employees here as well. In *Uphaus*, at page 76, the court distinguished facts within the *Nelson* case from the case under consideration and stated:

> "* * * In *Nelson* itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied.) 350 US, at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. * * *"

The court proceeded, then, to enumerate areas which states could certainly legislate against. (For an excellent discussion of the *Nelson* and *Uphaus* cases and loyalty oath requirements in general see Professor Cramton's article in 43 Minn. L. Rev. 1025, 1959.)

The Employees' conclusion to their pre-emption argument as stated on page 203 of their brief that alien professors must take the Washington State Oath of Allegiance is an erroneous statement disproven by the records in this case, as shown in Part VI of this brief.

In answer to Employees second argument on pre-emption (App. Br. p. 198), if the State of Washington or any other state chooses to set up require-

ments for its employees which do not permit it to accept Federal monies for the teacher or student exchange programs it may be a detriment to the state; however it is incorrect to state that a refusal by the state to accept optional Federal monies for teacher or student exchanges so interferes with American foreign policy as to render the legislation upon which the refusal is based unconstitutional.

It is therefore submitted that Employees' argument concerning pre-emption should be denied.

THE 1955 ACT DOES NOT REQUIRE SELF-INCRIMINATION.

Employees' contention, that the 1955 statute is void as requiring plaintiffs to incriminate themselves with respect to their own disloyalty, is strained, without merit and should be rejected.

The state high court interpreted this statute in relation to the Fifth Amendment privilege against self-incrimination in *Nostrand v. Balmer*, 53 Wn. (2d) 460, 477, 335 P. (2d) 10, and found no merit in a similar contention. There the court stated:

> "Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, * * *"

The disclaimer oath would be relevant in a prosecution for perjury only as the occasion which Employees used to commit perjury.

Since Employees are not being required to give testimony against themselves, *Nostrand v. Balmer*,

supra, but are merely required, pursuant to the 1955 Act, to disclaim their knowing participation in subversive organizations, the statute does not impinge upon the Fifth Amendment privilege against self-incrimination. *Communist Party v. S.A.C. Board*, 367 U. S. 1; *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Lerner v. Casey*, 357 U. S. 468; *Cohen v. Hurley*, 366 U. S. 117; *Beilan v. Board of Education*, 357 U. S. 399; *Gerende v. Election Board*, 341 U. S. 56.

Finally, there is a short but conclusive argument which must be mentioned:

> "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action. * * *" *Adamson v. California*, 332 U. S. 46, 59; also *Twining v. New Jersey*, 211 U. S. 78, 91-98.

THE DISTRICT COURT WAS CORRECT IN DISMISSING EMPLOYEES' COMPLAINT WITH PREJUDICE.

The three-judge court properly refused to adjudicate questions involving the 1931 Act. *Martin v. Creasy*, 360 U. S. 219 (1959); *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962); *Cf.* annotation, Remission of issues to state court, 3 L. ed. 2d 1827; (compare a similar order by this court in *Nostrand v. Little*, 362 U. S. 474 (1960) and 368 U. S. 436 (1962)). In any event, the dismissal with prejudice as to the 1931 Act only precludes the Employees from bringing another action

in the federal court until after the state court has authoritatively construed that act.

The lower court upheld the constitutionality of the 1955 Act and the dismissal with prejudice was the proper order with which to terminate the litigation. The Employee's contention is without merit.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STUDENTS.

Allowing the students to challenge the constitutionality of the statutes involved here would do violence to a longstanding judicial principle. This Court observed in *United States v. Johnson*, 319 U. S. 302, 305, that it would refuse to decide any dispute which "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."

Accordingly, in *Poe v. Ullman*, 367 U. S. 497, this Court refused to pass upon the constitutionality of a state statute where the moving party was unable to show that he was threatened with its immediate enforcement.

The general principle from these cases is applicable here since the statutes challenged in this case have no direct application to students; have never been enforced against students and were not intended to affect students. The students cannot show even an indirect injury.

CONCLUSION

The legislation is not perfect. It is controversial. Many doubt its wisdom. But it violates no constitutional provision and the route is open to legislative amendment and repeal. The wisdom of the statute is, of course, a matter for the legislature, not the courts. See *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, at p. 224. There is no reason for Employees to lose faith in the democratic process, a process which repeals oath requirements as well as creates oath requirements. They should not be permitted to avoid the "rough and tumble" of the legislature through this judicial challenge.

This Court should affirm the lower court with regard to its disposition of the challenge to the 1931 Act. Should this Court find that a justiciable controversy exists with regard to the 1955 Act, this Court should affirm the lower court's decision in that regard as well.

Respectfully submitted,

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